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CONVEYANCER'S NOTEBOOK

ESCROWS AND LEASES

In the March-April issue, commenting on *Beesly* v. *Hallwood Estates, Ltd.*,[1] we said (p. 89, *ante*): " It is perhaps unnecessary to point out that in the ordinary case of a lease not preceded by any contract actual exchange still appears to be necessary." A correspondent takes us to task on this and writes: " In my own case it is not only necessary for you to point this out, but also I should like to know the reason for your statement as quite obviously I am missing the whole point of the case. I did in fact think that the perturbation among solicitors was caused by the fact that the point of this case was based upon old-established law relating to delivery rather than on any contractual rights. Was not there in fact in this case no contract in the sense that the option was void? " On the first point Mr. J. T. Farrand agrees with our correspondent. His view is that a lease may be executed in escrow on the condition of execution of a counterpart and the execution of the lease becomes absolute on the performance of that condition without actual exchange, whether or not there is a preceding contract.

We are, however, quite unrepentant and, if we are wrong, we are wrong in good company, for J. G. M. in the *British Tax Review* [1961] at p. 7 takes the same view. In the Court of Appeal Harman L.J. said ([1961] 2 W.L.R. at p. 46): " Reliance was placed on [the] case of *Phillips* v. *Edwards*.[2] Those who rely on reports in 33 Beavan are sometimes said to be in the last ditch, but I do not complain at all here that there is anything wrong about the decision. However, it was a decision in a case about contract and it was said that the execution of the two documents without

[1] [1961] 2 W.L.R. 36.

[2] (1864) 33 Beav. 440.

exchange did not amount to a contract. There is, in my judgment, nothing controversial about that; indeed, I ventured to express some such view in *Hollington Bros., Ltd.* v. *Rhodes*,[3] a case to which the judge referred in his judgment." Donovan L.J. also referred to *Phillips* v. *Edwards* without disapproval.

In *Phillips* v. *Edwards* a trustee had power to grant a lease at the request in writing of Mrs. E. The terms of the lease were agreed, the lease and counterpart engrossed and the lease was duly executed by both the trustee and Mrs. E. Then Mrs. E. recalled her assent. The lessee had not by then executed the counterpart but he did so in due course and the Master of the Rolls in his judgment made it clear that, as the lessee intended in any event to execute the counterpart, it was immaterial that it had not been executed before the assent was recalled. The lessee sued for specific performance and he failed.

In *Hollington Bros., Ltd.* v. *Rhodes* Harman J. (as he then was) stated the general position in these terms [4]: " It is a commonplace that in many, indeed, in most cases, where a lease is to be granted everything remains in negotiation until the lease and its counterpart are finally exchanged between the parties. . . . It is said [that the execution of the lease and counterpart] ratified the terms settled by the solicitors and so created a contract. In my judgment such a contract cannot be spelled out of this state of things. There was, I think, no intention on either side to be bound by the course which negotiations took until the lease was exchanged with the counterpart, and this was never done."

Nor is there anything in *Naas* v. *Westminster Bank* [5] in conflict with *Phillips* v. *Edwards* and *Hollington Bros., Ltd.* v. *Rhodes*, for that was the case of a unilateral deed in the sense that, though technically *inter partes*, all the obligations were on the one side. If the Court of Appeal were upsetting the hitherto recognised practice they could hardly have made their intention less clear.

On our correspondent's second point, that the option was void, surely this was not so? Section 13 (2) of the Land Charges Act, 1925, provides that an estate contract shall be void as against a purchaser of a legal estate for money or money's worth unless registered before the completion of the purchase. It is submitted that " void " here clearly means voidable.

The Services of a Solicitor

There may be two views whether the Law Society should embark on publicity for solicitors generally, but certainly they could hardly

[3] [1951] 2 T.L.R. 691.
[4] [1951] 2 T.L.R. 694.
[5] [1940] A.C. 366.

have set about their task better. Mr. H. J. B. Cockshutt has written a short book with the above title and it has been published by Hodder and Stoughton, Ltd. as a paperback (price 2s. 6d.) with the sub-title "The Law Society's Guide." It is clearly written in a light style and illustrates the wide variety of work that may well pass through an ordinary solicitor's office. The author's story of the twins, each leaving £35,000, one estate paying £8,400 in estate duty and the other nil, is delightful. The "Worldly Solicitor"—will he never die?—naturally turns up. The author probably knows as much as anyone about the precise extent of the knowledge of the average articled clerk about to take his final, and we think he must have had his tongue in his cheek in suggesting that he would know all the points mentioned in the book. Schoolchildren are supplied with mathematics books without answers, so that they have to work out the problems for themselves but the Law Society has gone to the trouble of issuing a set of answers so that, if members of the public ask one of the standard questions, we shall not be unduly embarrassed. It is certainly worth reading by all solicitors even if only for the fun of testing one's knowledge.

Solicitors' Undertakings

Re Mallows [6] is a salutary reminder that solicitors' undertakings will be enforced and, as the Law Society have often emphasised, should not therefore lightly be given. Solicitors acting for a purchaser on searching in the Land Charges Registry discovered two puisne mortgages affecting the title. The vendor's solicitor said that all charges had been paid and on completion undertook to arrange for the cancellation of the entries. (Whether he was obliged to give such an undertaking is quite a different question, for if there is clear evidence of discharge the fact that the registrations are extant is quite irrelevant.) Apparently he had some difficulty in persuading the chargees to co-operate and there was evidence at one stage that he talked about a draft summons relating to the vacation of the charges which he was proposing to issue. At any rate, the undertaking was not complied with and the purchaser became impatient and took proceedings for an order that the solicitor should implement his undertaking.

It was held that it was clear from *United Mining & Finance Corp., Ltd.* v. *Becher* [7] that the court had jurisdiction to require a solicitor, as one of its officers, to implement his undertakings, and an order was made accordingly.

The most important class of case where undertakings are given

[6] (1960) 176 E.G. 1117.

[7] [1910] 2 K.B. 298.

is on redemption of building society mortgages, but this practice appears to be extending to other mortgages. When it is borne in mind that the power to consolidate is reserved in most mortgages, one sometimes wonders at the blithe way in which these undertakings are given. It is unlikely that a house-owner with a building society mortgage will have other mortgages on foot, but a builder without mortgages is almost unheard of.

Notices to Complete

In 1956 (Vol. 20, at p. 345) we drew attention to some of the unhappy decisions on notices to complete which make the task of the vendor wishing to forfeit a deposit difficult in the extreme. On a matter on which he should be able to act with certainty, he is liable to find himself in a position where he does not know whether he can put the property back in the market but does know that the purchaser's position is precarious. The purchaser can do a little legal blackmail. The latest decision [8] went in favour of the vendors, but there is nothing to indicate any change in the general sympathy shown to purchasers. This was a decision on the National Conditions of Sale (16th edition) but the Law Society's Conditions are to the same effect on this point, which is on the length of the notice. Both sets of conditions provide that after completion the vendor may serve not less than a certain number of days' notice after the date fixed for completion (twenty-eight days in the National Conditions, twenty-one in the case of the Law Society's).

The contract was for the sale of land at £39,000 and was dated July 28, 1959. The date fixed for completion was September 30. On October 15 and 21 the vendors' solicitors wrote pressing for completion and subsequently they telephoned. On November 3 they wrote again enclosing a notice under the conditions to complete not later than twenty-eight days from November 4. A deposit of only £1,950 had been paid. The purchasers were intending to finance the purchase with aid from a building society but they ran into difficulties. The vendors knew nothing about this at all.

In the course of his judgment Buckley J. said: " Reasonableness of the notice must be judged by matters known to the vendor or knowledge of which ought to be imputed to him. It would be extremely hard on the vendor if it were to be held that, having served notice which would appear to have been perfectly reasonable in the light of matters known to him, the notice was nevertheless unreasonable in consequence of something affecting the purchaser which was not known to him, something, perhaps, which might

[8] *Re Roger Malcolm Developments, Ltd.'s Contract* (1960) 176 E.G. 1237.

make the position hard for the purchaser. In the present case the vendors had no knowledge of how the purchasers were proposing to provide the purchase money. They had no reason to suppose that the finance was to be found by borrowing from a building society, and there ought not to be imputed to the vendors any knowledge that the purchasers might be in difficulties because of unfortunate occurrences happening at that time in the building-society world. At no stage did the purchasers disclose to the vendors that they were experiencing difficulties; in fact, on November 13, 1959, ten days after the notice, a letter was sent stating that the purchasers' financial arrangements were well in hand. In the circumstances, I do not think the vendors had any reason to suppose on November 3, 1959, that twenty-eight days' notice was not a sufficient period to constitute reasonable notice requiring the purchasers to complete." The notice was accordingly held valid and the deposit forfeited.

Nevertheless, as the cases now stand, the vendor's position is an unhappy one. What have the purchaser's financial arrangements, whether or not disclosed to the vendor, got to do with him? A agrees to sell a house to B for £5,000. He makes no inquiries as to B's financial position, assuming that B has the necessary finance. If B is not credit-worthy, he can apparently search for finance for some time and, so long as he gives A notice, can eventually get his deposit back on failure to raise the money: he gets an effective option to purchase, which may last some months, for nothing. It is suggested that both sets of conditions need revision on this point urgently.

Compulsory Registration

By the Registration of Title (City of Manchester) Order, 1961 (No. 582), and the Registration of Title (City of Salford) Order, 1961 (No. 583), compulsory registration of title to land on sale is extended to the Cities of Manchester and Salford on October 2, 1961.

The Rule Against Perpetuities

We have received a book entitled *The Rule against Perpetuities*, by Thomas W. Hooper, attorney-at-law, published by the author and printed by the Solicitors' Law Stationery Society, Ltd. (no price given). It is a curious book running to over 250 pages. The author's stated object is to show that legal contingent remainders are not subject to the modern rule against perpetuities, and that there is a rule against unbarrable entails separate and distinct from the rule prohibiting a tenant in tail from barring the entail. The author learnedly elaborates his theory into thirty-two rules. One of

his more elementary propositions is that an " executory limitation to an unborn person in tail preceded by an estate for life to the unborn parent of such person is void." As the argument proceeds the propositions become more unreal and one cannot help wondering if the author's research and scholarship have produced anything of utility. The rules governing contingent remainders, rooted in feudal history, had become more or less arbitrary by 1925 and it would not be difficult to put forward strong arguments for showing some of the cases to have been wrongly decided. At this point of time, so far as England is concerned, the book is closed and the misprints remain. Whether any common law system still delves into the mysteries of the subject we do not know, but, if so, practitioners will no doubt find Mr. Hooper's book of utility. For the rest, there must be few who revel in the intellectual study of the rules governing the subject.

The Way to Solicitors' Offices

When we recently inquired of some solicitors where their offices were to be found, we were told that as one left the station one went up the hill towards *The Robbers.*

REGISTRATION OF CHARITIES

By Spencer G. Maurice, Barrister-at-Law

Section 4 of the Charities Act, 1960, provides for the establishment of a central register of charities, to be maintained by the Charity Commissioners and the Minister of Education, but subsection (10) provides that the section is not to apply to charities taking effect before the commencement of the Act (for this purpose, January 1, 1961) until such date as the Home Secretary or, as regards any part of the register maintained by him, the Minister of Education may appoint by order made by statutory instrument; and that different dates may be appointed for different cases or classes of case. The effect of this subsection is that no charity which was already in existence on January 1 is registrable until an order has been made applying the registration provisions to it, but that every charity which has taken effect on and after that date has been immediately registrable, unless it falls within the exceptions comprised in subsection (4), and application should accordingly have been made by the trustees as required by subsection (6). It is not quite clear what is meant by the expression " taking effect," but presumably a charity founded by deed takes effect when the deed of foundation is executed and a charity founded by will when the personal representatives hand over the charitable gift to the charity trustees. Subsection (4) (*b*) provides for the exception of charities by order or regulations, and so far there have been excepted from registration voluntary schools with no permanent endowment other than their premises [1]; religious charities, including those for the relief of ministers and former ministers of religion and their families [2]; and funds, not representing permanent endowments, which are being accumulated for the purpose of local units of the Boy Scouts Association and the Girl Guides Association and which produce an income of more than £15 a year.[3] The exception of religious charities excepts the charities in question only until January 1, 1963, but the intention is that there should in the meantime be discussions with the religious bodies with a view to achieving a

1 The Charities (Exception of Voluntary Schools from Registration) Regulations, 1960, S.I. 1960 No. 2366, made by the Minister of Education.

2 The Charities (Exception of Religious Charities from Registration) Regulations, 1961, S.I. 1961, No. 986, made by the Home Secretary.

3 The Charities (Exception of Certain Charities for Boy Scouts and Girl Guides from Registration) Regulations, 1961, S.I. 1961, No. 1044, made by the Minister of Education.

degree of supervision by the bodies themselves over the funds in which they are interested, and, if satisfactory arrangements are made on these lines, permanent exception will doubtless follow.

The process of registering charities taking effect before January 1, 1961, has now begun with the making of the Charities (Registration) (Commencement No. 1) Order, 1961,[4] which appoints June 22, 1961, as the date for the registration of charities for the benefit wholly or mainly of any part of the administrative county of Bedford, the administrative county of Surrey or the county borough of Croydon. The Charity Commissioners and the Minister of Education have let it be known that Bedfordshire and Surrey have been selected for a trial run, and details of the procedure of registration may be revised in the light of experience gained in dealing with those two counties.

The pattern of registration is now clear. It is to be, generally speaking, by counties. General and national charities, on the other hand, will be registered on a separate basis, and orders relating to them will be made in due course. But while the branches of national charities will probably not as a rule require separate registration on a county basis, it will be otherwise where they hold land used for their purposes; thus application should already have been made for registration of a branch of a national charity having the use and occupation of land in Bedfordshire or Surrey, although the registration of the charity as a whole is not yet called for. It is clear that the Commissioners are to maintain a register of the charities over which they are exercising jurisdiction, and the Minister a register of the charities over which he is exercising jurisdiction, but it may not always be clear to trustees to which authority they should apply and submit registration particulars. The intention is that registration should be complete in three years, by which time the Rating and Valuation Bill, if passed, will have taken effect by the new valuation list coming into force. Since section 5 (1) provides that an institution shall for all purposes other than rectification of the register be conclusively presumed to be or have been a charity at any time when it is or was on the register, a registered charity will automatically be entitled to rating relief as well as relief from income tax. In this connection it is to be remembered that a charity which is not compulsorily registrable may be registered voluntarily under subsection (2) of section 4, and doubtless many will apply for voluntary registration in order to obtain easily tax and rating relief.

Trustees whose duty it now is to apply for registration, whether because theirs is a new charity (that is, one taking effect on or

[4] S.I. 1961, No. 987.

after January 1, 1961) or because it is in one of the compulsory registration areas, should do so without delay, since any delay in making the application interferes with the smooth working of the registration machinery, which has a vast task with which to deal. It is not practicable for the Commissioners or the Minister to write to the trustees of charities calling upon them to submit registration particulars, even when the charity is known to the department in question, because the chances are that the recorded information will not be sufficiently up to date to give the names and addresses of the present trustees. Therefore, it has been necessary to communicate to trustees the need to register in other ways. The making of the Order applying registration to Bedfordshire and Surrey has been publicised in the Press, and the Charity Commissioners have written to the clerks of borough, urban district and parish councils in the counties in question, to solicitors likely to act for charities in those counties, and to the secretaries of national charities which may have branches there requiring registration. The greatest knowledge of local charities is probably in fact possessed by parish councils. In the natural course of things parish councillors have a wide knowledge of local affairs; and because they are the local representatives of the beneficiaries of local charities, parish councils are required to be sent annually statements of account relating to parochial charities other than ecclesiastical charities.[5] Accordingly it seems likely that one way or another the need for registration will be brought fairly rapidly to the notice of charity trustees, and where a charity is not registered when it should be, it is probable that in due course the trustees will find themselves in difficulty over exemption from income tax and this will bring to their attention the need for registration.

As to the actual procedure of registration, trustees who duly apply to the Commissioners will receive from them an explanatory leaflet which should leave them in no difficulty as to the manner in which the application form should be completed. The Commissioners have also produced a leaflet explaining in detail the registration provisions of the Act.

The central register will contain a threefold classification of charities. First, they will be indexed geographically; secondly, there will be a cross-index arranged according to purposes; and, thirdly, there will be a general alphabetical index by name.

As the central register is compiled it will become possible for the local indices contemplated by section 10 to be established, the basis of any such index being the copies of the entries in the central

5 s. 32 of the Charities Act.

register which the Commissioners and the Minister are obliged to supply on request. It remains to be seen to what extent the local authorities empowered to maintain indices decide to do so, and, clearly, the usefulness of having an index must in every case depend upon local circumstances. At all events, it seems that it will seldom be advantageous to have more than a geographical local index.

Registration marks a vital stage in the scheme of the Charities Act, because in fulfilling that scheme, which is directed towards obtaining the maximum benefit out of charities, the first step is to find out what charities exist, and registration must go far towards producing a complete record. The completion of a local authority index represents a step towards a review of local charities, as contemplated and authorised by section 11, and, by enabling charities to discover kindred organisations, makes possible the consultation and co-operation authorised by section 12. But this is not to suggest that local authorities should plunge into reviews the moment the process of registration has revealed what local charities exist. The process of review is clearly not one to be hurried, and it should not be undertaken until the particular authority concerned judges the time to be ripe. Any such review should, moreover, logically extend only to charities having kindred purposes. For the review to be of value it may be necessary, on consideration of its results, to take a further step, that of the trustees seeking a scheme to enable the charities concerned to be administered more effectively, and here extension by section 13 of the *cy-près* doctrine will prove its value.

A LOCAL LAND CHARGE CASE

By J. F. Garner, ll.m., Solicitor

Local land charges do not often provide material for the law reports, but the recent case of *Stock* v. *Wanstead and Woodford Corporation*,[1] makes up for this scarcity in some measure by raising several points of general interest. In this case, a compensation notice under sections 28 and 46 of the Town and Country Planning Act, 1954, had been registered in the defendant council's local land charges register against a particular parcel of land. These notices, it will be remembered, record the fact that compensation has been paid in respect of a refusal of planning permission relating to the land, and they are made registrable in the local land charges register because, if planning permission for some kind of development is subsequently obtained in respect of the same land, the compensation previously paid (being in excess of £20) will thereupon become repayable to the Ministry of Housing and Local Government, by the person who is then the owner of the land. The 1954 Act does not in as many words declare such notices to be local land charges, but merely provides that they shall be registrable in the local land charges register, in manner to be provided for in Rules to be made under the Act; the Local Land Charges (Amendment) Rules, 1954,[2] subsequently provided that the notices should be registered (with other " planning charges," the definition of which was, by the same Amendment Rules, suitably expanded to include the notices) in Part III of the local registers.

In *Stock's* case, when the plaintiff, who was negotiating for the purchase of the land affected, searched in the register, he was issued by the local registrar with a clear certificate bearing no reference to the notice which was in fact registered against the property. He therefore completed his purchase, having also obtained planning permission from the local planning authority for the development he desired to carry out. The Minister then demanded repayment of the compensation referred to in the notice, pursuant to section 29 (1) of the 1954 Act, and the plaintiff paid the sum demanded. He then sued the council and their clerk, as registrar of local land charges. His action was dismissed by Stevenson J., because of the effect of section 17 (3) of the Land Charges Act, 1925 (which applies equally

1 [1961] 2 All E.R. 433.
2 S.I. 1954, No. 1677.

to local land charges and to land charges registered at the (Kidbrooke) Land Charges Registry). Under this subsection, it is provided that an official certificate of the result of a search in a register shall be conclusive, affirmatively or negatively as the case may be, in favour of a purchaser or intending purchaser, as against any person or persons interested in the subject matter of any particular entry. The Minister was here clearly such a person interested and therefore the plaintiff, having obtained a clear certificate, could have resisted any proceedings taken against him by the Minister for recovery of the compensation, and also could have carried out the development for which he had obtained planning permission, without making such repayment and in spite of the terms of section 29 (1) of the 1954 Act. Therefore, it was held that the plaintiff could not recover the amount he had paid, *ex gratia* as it were, to the Minister from the defendants or either of them.

Several points of interest emerge from this decision:

(a) Section 17 (3) of the Land Charges Act, 1925, applies only to local land charges properly so called (as defined in section 15 (1) of that Act, as amended by the Schedule to the Law of Property (Amendment) Act, 1926), and to charges which are expressly made subject to the Local Land Charges Rules, 1934,[3] by the creating statute or by rules made thereunder,[4] as in the latter case rule 15 (1) thereof expressly applies section 17 [5] to charges to which the Rules apply. Certain other statutory charges [5] are specifically made registrable in the local land charges register, " as if they were local land charges," but these are made subject to their own special sets of Rules (and *not* to the Rules of 1934), none of which incorporate section 17 (3).[6]

There are, therefore, three distinct classes of charges registrable in the local land charges register:

(i) Statutory charges, in respect of which the person making a requisition for an official certificate will not be able to rely on its accuracy, and a clear certificate will be no bar to the enforceability of that charge as against him;

(ii) Charges expressly made registrable in the local land charges register.[7] Here, the person making a requisition will, as is

[3] S.R. & O. 1934, No. 285/L.4, as amended by many subsequent Rules.

[4] As in the case of notices made registrable under Town and Country Planning Act, 1954, s. 28.

[5] For example, compulsory purchase orders and designation orders made under the New Towns Act, 1946.

[6] The latest example of charges of this kind is a " light obstruction notice," made registrable under the Rights of Light Act, 1959: see the Registers of Local Land Charges (Rights of Light, etc.) Rules, 1959 (S.I. 1959, No. 1733).

[7] There is a number of charges in this class: for a complete list, see the present writer's *Local Land Charges*, 4th ed., at p. 85.

shown by the present case, be entitled to rely on the accuracy of the official certificate. On the other hand, these charges are not local land charges properly so called, and consequently a purchaser, whilst undoubtedly entitled to the benefit of section 17 (3), will not also be entitled to rely on the closing words of section 15 (1) of the Land Charges Act, 1925 (as amended). These words provide that a local land charge will be void as against a purchaser for money or money's worth of a legal estate (and not just a " purchaser," as in the case of section 17 (3) [8]), unless the charge is registered in the appropriate register before completion of his purchase. Therefore, in the case of charges of this class, the purchaser who makes a personal search in the local land charges register and fails to find any such entry (either because of his own or some official's carelessness, or because no such charge is in fact registered) will not be protected if in fact such a charge is in existence; he will be protected only if he obtains an official certificate;

(iii) Local land charges properly so called; here alone will the purchaser be fully entitled to the benefit of both section 17 (3) and section 15 (1) of the 1925 Act.

(b) The plaintiff in the present case sued both the local authority and their clerk. The Local Land Charges Rules, 1934, provide that the " proper officer " or registrar for the purposes of the Land Charges Act, 1925, shall be the clerk to the local authority, and his status as defendant in the present proceedings seems clear. Why the local authority themselves were also made defendants does not appear from the report, nor is it clear that they could in any circumstances have been held liable, except, possibly, in the unlikely case where they may have directed that a false or misleading entry should be made in the register. This somewhat anomalous position whereby the local authority have no legal responsibility for a statutory register required to be maintained by one of their employees, was one of the matters which received the attention of the Stainton Committee on Local Land Charges,[9] who recommended that the local authority should themselves be made the registrar.

(c) The proceedings in *Stock's* case were based on the allegation of a contract between the plaintiff and the defendants, alternatively on an alleged breach of statutory duty, or, as a further alternative, on negligence. In view of the court's findings as to the effect of section 17 (3), it was not necessary for any opinion to be expressed

[8] " Purchaser " is defined in s. 20 (8) to mean " any person (including a mortgagee or lessee) who, for valuable consideration, takes *any* interest in land or in a charge on land."

[9] Cmd. 8440 (1952), para. 49.

on the question whether there could have been any breach of contract or a breach of a statutory or other duty owed to the plaintiff, but this may fall to be determined in some subsequent case; it is only surprising that the point has not arisen previously, but there are no reported decisions on this aspect of the case.

The elements of a contract are, prima facie, present, in that the plaintiff made a written requisition for an official search of the register, accompanied by payment of the prescribed fee. It is difficult, however, to conclude that the response of the registrar in making the requested search and sending the official certificate is an " acceptance " of the plaintiff's " offer," so as to create an executed contract, for the registrar had no option but to comply with the plaintiff's requisition, as he was under an express duty imposed by section 17 (2) of the Land Charges Act, 1925, to make the search and to issue the certificate.[9a] In this respect, a search in the local land charges register differs from the " additional inquiries " that are customarily made of a local authority contemporaneously with a local search. The forms of inquiries customarily used for this purpose, which are the result of discussions between the Law Society and the local authority associations, are unknown to statute, and a particular authority (or their clerk) is under no obligation to reply as requested to such inquiries; if they reply, they will do so on a contractual basis, and any proceedings arising out of their replies would have to allege a breach of such contract. The probability of proceedings in such a case being successful is, however, remote in practice, in view of the disclaimer of liability [10] printed on the inquiries form, which is clearly wide enough to cover cases of mistake or carelessness (but not, possibly, the rare case of deliberate fraud).

A criminal sanction may follow (see Land Charges Act, 1925, section 17 (5) [11]) in any case of fraud, collusion or wilful negligence on the part of the registrar or a member of his staff, but, even where this remedy applies, it is submitted that the subsection would not constitute any bar to an action by the person requesting an official certificate for a breach of statutory duty in a case where (contrary to *Stock's* case), as a consequence of a false or misleading certificate he has suffered damage. Apart from the fact that section 17 (5) could not be invoked in all circumstances [11] where such a

[9a] It has been suggested to the writer that the existence of the register is a standing offer, accepted by the official requisition for a search and payment of the fee. The whole context of the transaction seems, however, to take it outside the consensual concept of a contract.

[10] Answers are given " on the distinct understanding that neither the Council nor any officer of the Council is legally responsible therefor."

[11] The subsection is applied only to local land charges properly so called, by s. 15 (3) of the 1925 Act.

plaintiff may have suffered damage, it is submitted that section 17 (2) imposes not only a public duty, but also a duty towards the person requisitioning the search. There is a distinction between this type of statutory duty, and the type where the duty is a public one, not owed to any particular individual, as in the Road Traffic Act cases of *Badham* v. *Lambs, Ltd.*[12] and *Clark* v. *Brims*,[13] and other cases under similar statutes. In deciding whether an action will lie on a statute for breach of duty, " one must look at the Act generally; . . . if no remedy by way of penalty or otherwise is prescribed for its breach generally a right of civil action accrues to the person who is damnified by the breach," said Salmon J., in *Att.-Gen.* v. *St. Ives R.D.C.*[14] The duty conferred by section 17 (2) would, it is submitted, be held by the courts to be something more than one owed to the public at large; the section clearly has the person requiring a search in mind, and he ought to be entitled to take proceedings in the event of a breach of that duty whereby he has suffered damage. If there is a specific remedy prescribed by an Act, this may bar other types of proceedings, but that rule is not absolute,[15] and in the present case the criminal sanction of section 17 (5) is by no means all-embracing.

The question whether an action would lie in negligence at common law in the present circumstances is irrelevant, in view of the probability of an action on the statute being successful; if there were no relevant statutory provision, the action could then be based on breach of contract.

(d) To return to the facts of *Stock's* case, it is interesting to consider whether the plaintiff would have any remedy against the Minister of Housing and Local Government. This seems doubtful, as his " mistake " in paying the compensation in circumstances in which he was not legally liable to do so by virtue of the operation of section 17 (3) of the 1925 Act would almost certainly be classified by the court as a mistake not of fact but of law. The headings of quasi-contractual liability are possibly not closed or clearly defined, but it is reasonably well established that money paid under mistake of law is not recoverable.[16] The Minister is in the same position in this case as any ordinary subject of the Crown in this respect,[17] and therefore he would be entitled to refuse to refund money

12 [1945] 2 All E.R. 295.
13 [1947] 1 All E.R. 242.
14 [1959] 3 All E.R. 271 at p. 377; affirmed (on other grounds) by the Court of Appeal at [1961] 1 All E.R. 265.
15 As is shown by *Black* v. *Fife Coal Co., Ltd.* [1912] A.C. 149, where it was said by Lord Kinnear (at p. 165) that " we are to consider the scope and purpose of the statute and in particular for whose benefit it is intended."
16 *Holt* v. *Markham* [1923] 1 K.B. 504.
17 Crown Proceedings Act, 1947, s. 21 (1).

paid to him voluntarily under a mistake of law.[18] The Minister is in no kind of fiduciary relationship with the plaintiff (as in the famous case of *Re Diplock* [19]) and he had not made any form of misrepresentation either innocent or fraudulent to the plaintiff, and therefore there is no other heading of liability under which the plaintiff could recover the compensation money paid in misapprehension of his true legal position.

[18] *Sebel Products Ltd.* v. *Commissioners of Customs and Excise* [1949] 1 All E.R. 729.
[19] [1950] 2 All E.R. 1137.

TRUSTS FOR THE ACCUMULATION OF INCOME BEYOND THE STATUTORY PERIODS

By Ernest H. Scamell, ll.m., Barrister-at-Law

At the end of last year, two forms were published in this journal [1] which had as their combined object the creation of a discretionary trust of the income of a trust fund with provisions designed to secure the capitalisation of any income not distributed under the discretionary trust and which it was sought to make effective notwithstanding the fact that the discretionary trust (and therefore the provisions for the capitalisation of income) might well extend beyond any of the periods permitted for the accumulation of income by section 164 (1) of the Law of Property Act, 1925. These forms have recently been the subject of a critical article in the *Law Times* [2] which begins with the premise that " Wealthy settlors seeking to save income tax, surtax, estate duty and stamp duty frequently demand the legally impossible of their legal advisers "; proceeds on the assumption that the forms in question were designed to meet the requirements of such a settlor; and concludes in relation to the scheme sought to be effected that " The present writer . . . is not satisfied that it is not too risky to be adopted until it has been tested in the courts " and that it would be difficult to convince the revenue authorities as to its validity. Although, in point of actual fact, the forms in question were not drafted to save income tax, surtax, estate duty or stamp duty, but were drafted primarily to carry out the intentions of the settlor in regard to the period during which he wished the discretionary trust and capitalisation of income to enure, we welcome, on more general grounds, the interest and comments of our critic.

It is pointed out in the article, that ever since the decision in *Re Robb*,[3] it has been established that even a mere *power* to accumulate income is within the scope of section 164 (1) of the Law of Property Act, 1925. It is then suggested that, despite the use of two documents to carry out the scheme, the courts would be likely to read the two documents together so as to construe it as a single transaction with the result (it is said) that there would be a power to accumulate income such as would offend the provisions of section 164 (1). An authority is cited, namely, *Cohen and Moore* v.

1 (1960) 24 *Conveyancer* (n.s.), Form 38, pp. 779–784.
2 (1961) 231 L.T. 288.
3 [1953] Ch. 459.

I.R.C.,[4] where two nominally separate legal transactions were regarded as a single transaction so that (in that case) an oral declaration of trust having been followed by a deed evidencing the terms of that trust, the latter was stampable with *ad valorem* settlement duty. Quite apart from the fact that this was a stamp duty case, it is significant, so far as concerns any inference that the case laid down a general principle, that in the substantially similar case of *Grey* v. *I.R.C.*,[5] Upjohn J. distinguished *Cohen and Moore* v. *I.R.C.* and found in the case before him that there were in fact two separate transactions. It is accordingly submitted that whether or not two separate transactions or documents will be read together is a pure question of fact and that where, as advocated in the note to the present forms, the second of the documents is executed after the first, by persons who were not parties to the first, and who were under no obligation to execute the second document, in fact the second document must be regarded as legally distinct from the first. It would be otherwise where the parties to both documents were the same and where the execution of either of them was in any way understood as being conditional upon the execution of the other of them as, for example, in the recent case of *Lewis* v. *Frank Love, Ltd.*,[6] where a transfer of a mortgage and an agreement for the granting of an option to purchase the mortgaged premises made in favour of the transferee, were held to be parts of the same transaction so that the option was void as being a clog on the equity of redemption. Counsel for the transferee, in seeking to uphold the validity of the option, did, indeed, place considerable reliance on the fact that the transaction was carried out by two documents and advanced the argument that this fact could make the transaction good notwithstanding that had it been carried out in a different form it might have been objectionable. Plowman J. rejected this argument, not upon any general proposition that a transaction carried out in two documents is legally the same thing as if it were carried out in one document, but upon the special circumstance, which applied in that case, that, when considering clogs on the equity of redemption, equity looks to the substance and not to the form of the transaction. No such special considerations arise in the present case, which is concerned solely with the question whether or not the transaction offends the provisions of section 164 (1) of the Law of Property Act, 1925. It should be added that, whilst it is considered essential that the parties respectively executing the two

[4] [1933] 2 K.B. 126.
[5] [1958] Ch. 375. The decision was reversed on another point by the Court of Appeal whose decision was upheld by the House of Lords [1960] A.C. 1; affirming [1958] Ch. 690.
[6] [1961] 1 W.L.R. 261.

documents should not do so in pursuance of any pre-existing legal obligation, it is considered entirely irrelevant that the second document may have been within the contemplation of any of the parties at the time of the execution of the first document. The fact, therefore, that there are, in the second form, several references to the provisions of the first and that there may be other indications that the second document was in contemplation from the outset, is considered to be of no consequence.

The problem which the forms in question were actually designed to solve was the simple one of how to provide for an accumulation of income beyond any of the four statutory periods. When dealing with such a problem, the first step must surely be to scrutinise the wording of the relevant statutory provision which is as follows: " 164.—(1) No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following. . . ."

The first point to note is that what is prohibited is a settlement or disposition of *property* providing for the accumulation of the *income* thereof. The section does not, therefore, apply to a settlement or disposition of the income of any property where the property itself is not settled or disposed of.[7] The reason for this would appear to be as follows. Once the income of property is paid over to a person entitled thereto, it becomes, in the hands of the recipient, part of his disposable property generally, and loses its character as income of the property from which it was derived. Accordingly, if the money so received is subjected to a trust for its capitalisation over a lengthy period, such a trust is not a trust affecting the property from which such money was derived but is a trust of the money *simpliciter*.

This is the anchor on which the forms now under consideration seek to fasten. Under the first form—the Settlement—there is power to apply income not required for the principal beneficiary, amongst the persons therein defined as " the other Beneficiaries." Accordingly, there is under this Settlement no power or trust for the accumulation of the income of the trust fund thereby settled. Under the second form—the Declaration of Trust—" the other Beneficiaries " resettle any moneys received by them from the trustees of the Settlement, upon discretionary trusts for the benefit —amongst others—of the trustees of the Settlement. It follows that " the other Beneficiaries " have power under the Declaration of Trust to pay the moneys in such a way as to provide for their accumulation in the hands of the Settlement trustees, which power

7 See *Lindsay's Trustees*, 1911 S.C. 584.

is expressed to be exercisable during a period which may exceed any of the statutory periods, but here again " the other Beneficiaries " are not thereby disposing of any property in a manner so that the income thereof may be accumulated but, on the contrary, are disposing of the income of property; the case accordingly falls within the principle in *Lindsay's Trustees* case, *supra*. The reason for the inclusion of other persons in addition to the trustees of the Settlement as objects of the discretionary trust under the Declaration of Trust, is to secure that it is not the automatic result of the trustees of the Settlement making a discretionary payment of income to " the other Beneficiaries " that such income necessarily comes back to them. If this were the case, then it could be argued that the trustees of the Settlement had, in effect, *themselves* power to see that the income of the property comprised in their trust fund should be capitalised, *i.e.*, accumulated therewith and on the basis of *Re Robb*, *supra*, such a power would clearly be valid only for the appropriate period permitted by section 164 (1).

To summarise the effect of the foregoing, it is submitted that, if different persons have the property vested in them from the persons who have the obligation or power to accumulate the income of such property, then section 164 (1) has no application. If this interpretation of section 164 (1) be correct, then it is further submitted that it is wholly irrelevant that the necessary division of function between these persons is effected intentionally. There appears to be no overriding consideration such as the equitable principle that equity looks to intent or substance and not to form which might constrain the courts to regard a calculated division of function as ineffective, and in *Re A.E.G. Unit Trust*,[8] the court was not slow to hold that, where the language of section 164 (1) was inappropriate to a power to accumulate which appeared in a unit trust scheme, the section had no application; and this salutary principle of statutory interpretation would, it is suggested, apply equally to the present case.

It may be useful to mention that there are other ways than that contemplated by the forms under discussion of securing an effective accumulation of income beyond the statutory periods. Amongst others, the following may be referred to:

(1) The creation of a trust the capital of which consists of a form of property in which there is, technically, no income as such but where the capital of the property is progressively increased. Examples of such a form of property are National Savings Certificates and certain types of insurance policy.[9]

[8] [1957] Ch. 415.
[9] See *Bassil* v. *Lister* (1851) 9 Hare 177; *Vine* v. *Raleigh* [1891] 2 Ch. 13.

(2) The creation of a trust or other legal relationship which is of a predominantly commercial character and in which the expressions " grantor," " settlor " and " beneficiary " are wholly inapposite. Thus, it has already been mentioned above that the section has no application to a power to accumulate contained in a unit trust.[10] The principle of this decision could presumably be applied to other situations of an essentially commercial character, *e.g.*, to partnership agreements.

(3) By the creation of a trust or other legal relationship providing for an accumulation of income for any of the purposes mentioned in section 164 (2).[11]

It is, of course, well known to every draftsman that in the case of settlements *inter vivos*, the provisions of section 164 (1) are peculiarly inconvenient since in the absence of any beneficiaries who are infants, the only period which is available for an immediate accumulation is the life of the grantor or settlor. In its Fourth Report, the Law Reform Committee, in 1956, recommended that in the case of settlements *inter vivos* a further period of accumulation should be available, namely, a period of twenty-one years from the date of the settlement.[12] So far, this recommendation has not been carried into effect by Parliament, but it might be questioned whether the courts would be unduly vigilant in seeking to thwart the attempts of draftsmen to accomplish this very reasonable end. However this may be, it is considered to be the proper function of the draftsman to seek, wherever possible, to give effect to the lawful aspirations of his clients. It may well be tempting, where such aspirations lie off the beaten track, to dismiss them as impossible to implement, but new problems sometimes make good law and even if, in any particular case, the draftsman should not succeed, at least the resulting position is no worse than if the attempt had not been made in the first place.

10 See *Re A.E.G. Unit Trust*, *supra*.
11 See thereon, Potter and Monroe, *Tax Planning*, 3rd ed., p. 162 *et seq.*
12 Cmnd. 18, paras. 56, 57.

MORTGAGEE'S RIGHT TO POSSESSION

By Bernard Rudden, m.a., Solicitor

" A mortgagor and mortgagee are characters as well known, and their rights, powers and interests as well settled as any in our law." [1] The confidence felt by Buller J., and shared by several of his brethren,[2] appears today somewhat misplaced; and to none more so than the lawyer instructed to obtain, for a mortgagee, possession of the mortgaged premises.

It is never denied that the mortgagee is, in the absence of any contrary provision, entitled to possession; nor is any other situation apparently envisaged by the common-form mortgage by demise. But this document is, we know, notoriously unreliable as a guide to the actual intention of the parties. Their intention is usually that the mortgagor shall have possession. The phrase " tacit agreement " seems to be the favourite judicial description of the situation.[3] Moreover, the mortgagee's right of possession has long been regarded as a remedy for the protection of his interest payments; and, in view of the strictness of equity's supervision over the accounts in a suit for redemption, the text-writers tend to adopt a somewhat timorous attitude to its exercise.

Thus Dr. Megarry and Dr. Wade place the mortgagee's right to possession in the section of their book devoted to the methods of protecting interest payments and state: " The usual object of a mortgagee in taking possession is to intercept the net rents and profits so as to secure punctual payment of interest." [4] Dr. Cheshire considers that taking possession " is not in accordance with the spirit of the transaction and it is not usual for a mortgagee, despite his legal right, to enter into actual possession unless the interest has fallen into arrear and it has become desirable to prevent the rents and profits from reaching the mortgagor. One formidable deterrent to this course is the strict supervision which equity exercises over a mortgagee in possession." [5] Mr. Turner speaks of a mortgagee's taking possession only as " a last

[1] *Birch* v. *Wright* (1786) 1 T.R. 378, at 383.

[2] *e.g.*, Lord Selborne L.C. in *Heath* v. *Pugh* (1881) 6 Q.B.D. 345, at 359; Jessel M.R. in *Re Knight, ex p. Isherwood* (1883) 22 Ch.D. 384, at 391.

[3] See *Moss* v. *Gallimore* (1779) 1 Dougl.K.B. 279, at 283; *Christophers* v. *Sparke* (1820) 2 Jac. & W. 223, at 235.

[4] *Real Property*, 2nd ed., p. 868.

[5] *Modern Real Property*, 8th ed., p. 574.

resort " [6] and although Professor Waldock [7] and Professor Hanbury [8] point out that equity's vigilance need not deter a prudent man of business, they too appear to consider the right to possession as a means of protecting the income.

If this were so it would be difficult to see why a mortgagee should ever take possession.[9] As a means of protecting his income, he can do nothing by taking possession that he cannot, with greater impunity, achieve by appointing a receiver.[10] The latter will be deemed to be agent for the mortgagor [11] and, however artificial this conception, the court will adhere to it.[12] Why is it, then, that mortgagees' applications for possession are constantly before the courts?

Generally speaking, the most popular—because most efficacious—remedy available to a mortgagee is his power of sale. He may wish to exercise this power because he needs repayment of his loan and cannot obtain it in any other way, or default by the mortgagor in paying interest, or instalments of principal and interest, may persuade him that the best course is to call the arrangement off and his capital in. He may, of course, be content with machinery to ensure prompt payment of the instalments; in which case he will probably appoint a receiver. But it is far more likely that—having regard to the inconvenience of introducing (and paying) a third party, and the attractive state of the investment market—he will prefer to recover his principal and invest afresh. Furthermore, since a vast number of mortgages are today advances to owner-occupiers of private dwelling-houses, there is no purpose in appointing a receiver as there are no rents and profits for him to intercept. The simplest course of action open to a mortgagee—assuming the mortgagor is unable to find the money elsewhere—is to exercise his power of sale.[13]

To sell with advantage, however, he must sell with vacant possession. His right to possession, therefore, has become a remedy to secure, not payment of interest as in the past, but repayment of the principal. This situation, and the social pressures which have occasioned it, have been recently remarked by Harman J. (as he then was) in these words: " In the old days mortgagees kept out of possession because they did not want to

6 *The Equity of Redemption* (1931), p. 88.
7 *Mortgages*, 2nd ed., pp. 238, 239.
8 *Modern Equity*, 7th ed., p. 347.
9 Unless he wants to farm the land himself: see *ibid.*
10 Save that the retention of possession for 12 years may bar the equity of redemption: Limitation Act, 1939, s. 12. Possession by a receiver is never adverse to the mortgagor—*Re Hale* [1899] 2 Ch. 107.
11 Law of Property Act, 1925, s. 109 (2).
12 See *Stroud Building Society* v. *Delamont* [1960] 1 W.L.R. 431.
13 It is usually statutory and conferred by Law of Property Act, 1925, s. 101.

have to account as mortgagees on the footing of wilful default, but the opposite has come about in these days. The only way in which a mortgagee can realise his security to advantage is by obtaining vacant possession and selling as mortgagee." [14]

It is one thing to have a right to possession; it is another to obtain the remedy. Nowadays the main difficulty lies in the assumption by the Chancery Division of a discretion to adjourn a mortgagee's summons for possession on such terms as it thinks fit.[15] The learned authors of one well-known treatise observe that " the limits of the court's discretion are at present obscure." [16] The purpose of this article is to attempt to clarify the problem by an examination of the right to possession and of the procedure provided for its enforcement. It is submitted that such examination will show the area of the court's discretion to be very small indeed.

The right

It has never seriously been doubted that, as between the mortgagor and mortgagee, the latter, unless there be agreement to the contrary, is entitled to possession. Under the early forms of mortgage it was intended that the mortgagee should actually take possession.[17] In Glanvil's day he took the rents and profits in lieu of interest (the mortgage) or in reduction of the principal (the vivegage).[18] By the time of Bracton the usual form of a mortgage was a lease to the mortgagee who took possession and farmed the land for his interest; on default in payment of the principal the term of years was enlarged into the fee.[19] Although in the centuries that followed the form of mortgage changed to a conveyance of the fee defeasible upon condition subsequent, it seems that the mortgagee still took possession. Littleton makes no statement that would suggest the contrary, nor does Coke in his commentary.[20]

By the latter's death, however, the custom of leaving the mortgagor in possession seems to have begun. In *Powsley* v. *Blackman* [21] we find a proviso " that the mortgagee, his heirs and assigns shall not intermeddle with the actual possession of the

[14] *Hughes* v. *Waite* [1957] 1 W.L.R. 713, at 715. See also the learned judge's remarks in *Alliance Perpetual Building Society* v. *Belrum Investments Ltd.* [1957] 1 W.L.R. 720, at 723; and *Fourmaids Ltd.* v. *Dudley Marshall Properties Ltd.* [1957] Ch. 317, at 320.

[15] *Infra*, p. 287.

[16] Megarry & Wade, *Real Property*, 2nd ed., p. 870.

[17] Except in transactions with the Jews. See Holdsworth, *History of English Law*, 3rd ed., Vol. 3, p. 131.

[18] Glanvil, lib. x, cc. 6, 8, 9. See Holdsworth, *op. cit.*, Vol. 3, p. 128.

[19] Bracton, f. 20.

[20] *Tenures*, lib. iii, c. 5, ss. 332, 337, 339.

[21] (1620) Cro.Jac. 659.

premises or perception of the rents until default of payment." Other cases of the same period suggest that the practice of leaving the mortgagor in possession was growing.[22] After the Restoration it seems to have become a commonplace and eventually (though not till Lord Mansfield's day) it presented the common law courts with a problem. The legal fee was clearly in the mortgagee; yet the mortgagor was in possession. They were greatly exercised to define the relation between the parties—was it *sui generis* or some form of tenancy? We are not concerned to pursue their investigation into the question, but it should be noted that the touchstone, the guiding principle in these difficulties, was that, as between the parties to the mortgage, the mortgagee could maintain ejectment without notice to quit or demand of possession. Lord Mansfield stated the position clearly: "When the mortgagor is left in possession the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit and he is not even entitled to reap the crops as tenants at will are because all is liable to the debt. . . ." [23] A few years later, Buller J. asserted categorically, if *obiter*, "The mortgagee has the right to immediate possession whenever he pleases; he may bring his ejectment at any moment that he will. . . ." [24] In *Doe* d. *Fisher* v. *Giles* counsel for the mortgagor maintained that his client was entitled to notice. The argument is framed in terms that have a curiously modern ring. "The mortgagor, when permitted by the mortgagee to remain in possession, becomes thereby his tenant at will and, as such, entitled, before an ejectment is brought, to be informed of the determination of the mortgagee's will by a demand of possession. To deny him this would operate with great hardship and injustice; because the mortgagee, by allowing him to remain in possession, impliedly rescinds the strict letter of the contract and encourages him to sow in the fair expectation that he shall reap." [25] The court, however, would have none of it, Best C.J. observing that, "If this situation exposes mortgagors to any hardship they must guard against it by an alteration in the terms of the mortgage deeds." [26] In an action by the mortgagor's assignee in bankruptcy against a tenant who had been instructed by the mortgagee to hold the rent, Littledale J. in giving judgment for the defendant stated

22 *Stone* v. *Grubham* (1615) 2 Bulst. 225; *Sibson* v. *Fletcher* (1632) 1 Chan.Rep. 59; *Hales* v. *Hales* (1636) 1 Chan.Rep. 105. Turner discusses these cases—see *Equity of Redemption* (1931), p. 89.

23 *Keech* v. *Hall* (1778) 1 Dougl.K.B. 21, at 22.

24 *Birch* v. *Wright* (1786) 1 T.R. 378, at 383.

25 (1829) 5 Bing. 421, at 424. Compare *Combe* v. *Combe* [1951] 2 K.B. 215, *per* Denning L.J., at 220.

26 *Ibid.*, at 428.

"There is, at all events a peculiar relation existing between mortgagor and mortgagee. When a mortgage is executed the mortgagee becomes legal owner of the land and is entitled to immediate possession, or to the rents and profits."[27] Bayley J. agreed: "The mortgagor cannot dispute the title of the mortgagee. When the mortgagor occupies the premises he holds under the mortgagee who may put an end to the rights of the mortgagor."[28] In an action under the Statutes of Limitations it was held that the mortgagee was entitled to possession from the date of the deed and not from default and therefore time began to run against him from the moment the mortgage was executed.[29]

It was always recognised that it was competent for the parties by some stipulation in the mortgage deed to preclude the mortgagee from taking possession.[30] If there were no such provision, or if, by some default, the mortgagor had ceased to be entitled to its protection, there is no doubt that the mortgagee could take possession whenever he chose; and a whole chorus of common law judges proclaims their anxiety to assist him.[31]

The courts of law, of course, had regard merely to the external appearance of the transaction. Its real nature was divined and protected by the Chancellor; and if there were to be any suggestion that the mortgagee was not entitled to immediate possession we should expect it to come from him. Equity, however, refused to interfere, by injunction or in any other way, with the mortgagee's action in ejectment unless the mortgagor commenced a suit to redeem and produced the principal, interest and costs. Thus in *Cholmondeley* v. *Clinton*[32] Sir William Grant M.R. explained the position in the following words: "It will not be disputed that an Equity of Redemption is an Equitable right for it is only in Equity

27 *Pope* v. *Biggs* (1829) 9 B. & C. 245, at 253.

28 *Ibid.*, at 251.

29 *Doe d. Roylance* v. *Lightfoot* (1841) 8 M. & W. 553. Perhaps it should be mentioned that Lord Denman C.J. appears to have considered that the mortgagee's right to possession arose only on default: see *Evans* v. *Elliot* (1838) 9 Ad. & E. 342, at 354; *Rogers* v. *Humphreys* (1835) 4 Ad. & E. 299, at 313: and see Prideaux, *Precedents*, 4th ed. (1864), Vol. 1, p. 324. But the general opinion is clear—see cases cited *infra*, note 31.

30 The covenant implied by the words "as Beneficial Owner" includes what appears to be a right of entry on default: Law of Property Act, 1925, s. 76 (1) (*c*), Sched. II, Pt. III. But this, apparently, confers no right of entry but only an action for damages: Wolstenholme and Cherry, *Conveyancing Statutes*, 11th ed., Vol. 1, p. 524, citing *Northern Banking Co.* v. *Devlin* [1924] 1 I.R. 90.

31 In *Doe d. Roby* v. *Maisey* (1828) 8 B. & C. 767; *Rogers* v. *Humphreys* (1835) 4 Ad. & E. 299; *Doe d. Jones* v. *Williams* (1836) 5 Ad. & E. 291; *Hitchman* v. *Walton* (1838) 4 M. & W. 409; *Doe d. Garrod* v. *Olley* (1840) 12 Ad. & E. 481; *Doe d. Parsley* v. *Day* (1842) 2 Q.B. 147; *Doe d. Snell* v. *Tom* (1843) 4 Q.B. 615; *Rogers* v. *Grazebrook* (1846) 8 Q.B. 895; *Lows* v. *Telford* (1876) 1 App.Cas. 414; *Green* v. *Burns* (1879) 6 L.R.Ir. 173.

32 (1817) 2 Mer. 171.

that, after forfeiture, it has an existence; and although the Equitable Ownership be in the Mortgagor, yet his possession is of a more precarious nature than that of any other *cestui que trust*. In general a Trustee is not allowed to deprive his *cestui que trust* of the possession, but a Mortgagee may assume the possession whenever he pleases, and therefore a Mortgagor is called Tenant at Will to the mortgagee and in point of Possession he is so even in Equity; For a Court of Equity never interferes to prevent the Mortgagee from assuming the possession." [33] His successor, Sir Thomas Plumer M.R. reiterated the point. "The late Master of the Rolls observes that, in general a trustee is not allowed to deprive his *cestui que trust* of possession, but a Court of Equity never interferes to prevent a mortgagee from assuming possession. By not interfering in this latter case a Court of Equity does not, as it is supposed . . . refuse to afford protection to a *cestui que trust* against his trustee; but the interference is refused because the mortgagor and mortgagee do not, in this instance, stand in the relation of trustee and *cestui que trust*. The mortgagee when he takes the possession is not acting as trustee for the mortgagor but independently and adversely for his own use and benefit. A trustee is stopped in equity from dispossessing his *cestui que trust*, because such dispossession would be a breach of trust. A mortgagee cannot be stopped because in him it is no breach of trust but in strict conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of this right." [34]

If, then, the mortgagor could not find the whole debt, equity would do nothing to prevent the mortgagee from taking possession.[35] She was content to protect the mortgagor's rights in his suit for redemption by taking accounts against the mortgagee on the basis of wilful default [36]; and if the mortgagee had entered into possession without there being any default on the part of the mortgagor, the account was taken with yearly rests.[37] Indeed,

[33] *Ibid.*, at p. 359.

[34] *Cholmondeley* v. *Clinton* (1820) 2 Jac. & W. 1, at p. 183. See also *Christophers* v. *Sparke* (1820) 2 Jac. & W. 223; *Jolly* v. *Arbuthnot* (1859) 4 De G. & J. 224; *Re Hart, ex p. Bayley* (1880) 15 Ch.D. 223; *Corbett* v. *Plowden* (1884) 25 Ch.D. 678.

[35] If he could find the money equity would grant an injunction to prevent the mortgagee from exercising his rights at common law—where, once the contractual date for repayment had passed, the mortgagee's right was absolute. A "mock equity" (the phrase is Maitland's) was introduced to effect the same principle in an ejectment by an Act of 1734: 7 Geo. 2, c. 20; and see the Common Law Procedure Act, 1852, s. 219.

[36] Which need not be raised on the pleadings: *Mayer* v. *Murray* (1878) 8 Ch.D. 424.

[37] *Shephard* v. *Eliot* (1819) 4 Madd. 254; *Nelson* v. *Booth* (1858) 3 De G. & J. 119 (dictum).

the very strictness of her attitude in this regard is only explicable by her appreciation that she should not—could not—act directly to prevent the mortgagee from taking possession. As Rigby L.J. pointed out in *Gaskell* v. *Gosling* " This entry into possession was always considered a strong assertion of his legal rights, since he did not come under any obligation to account to the mortgagor except in a suit for redemption. He was accordingly treated with exceptional severity in a suit for redemption and made to account, not only for what he actually received but for what, without wilful default, he might have received." [38]

Neither the procedural reforms of the 1870s nor the conveyancing improvements wrought by the 1925 property legislation operate to detract from the mortgagee's right to possession. If the security be effected by demise, the mortgagee takes a legal estate conferring the right to possession,[39] and section 95 (4) of the Law of Property Act, 1925, expressly saves the right of the mortgagee to take possession " whether or not his charge is secured by a legal term of years absolute." The owner of a charge by way of legal mortgage has " the same protection powers and remedies (including the right to take proceedings to obtain possession . . .)" as if he had " a mortgage term for 3,000 years." [40]

It may be asserted, therefore, that in theory the mortgagee's right to possession is unchallenged by either law or equity; and that this is the case has been vigorously affirmed by Harman J. (as he then was). The mortgagee's right to possession, he says, " has nothing to do with the enforcement of the mortgage debt nor with foreclosure. Possession is a remedy to which a mortgagee is entitled as of right against the mortgagor, whether the principal or interest be due or not, unless there is some special clause in the mortgage excluding it. . . . The remedy in no way depends on default." [41]

The remedy

Before 1936 a mortgagee who wished to obtain possession alone could issue a writ in the King's Bench Division and get a judgment for possession either in default or under the rules dealing with summary applications for judgment. The " beneficent originating

[38] [1896] 1 Q.B. 669, at 691.
[39] Law of Property Act, 1925, ss. 51 (1), 149 (2).
[40] *Ibid.*, s. 87 (1). Presumably the legislature intended no distinction between the right of a mortgagee or chargee " to take possession " and the right of a chargee " to take proceedings to obtain possession."
[41] *Alliance Perpetual Building Society* v. *Belrum Investments Ltd.* [1957] 1 W.L.R. 720, at 723. See also *Wright* v. *Pepin* [1954] 1 W.L.R. 635, at 639; *Fourmaids Ltd.* v. *Dudley Marshall Properties Ltd.* [1957] Ch. 317 quoted *infra*, p. 291.

summons "[42] had been introduced into the Chancery by R.S.C., Ord. 55, r. 5A. A mortgagee could avail himself of it and obtain an order for delivery of possession, but only if his claim was joined with a request for some other remedy such as foreclosure. This coupling of the remedies gave the Chancery an opportunity to exercise a discretion and to adjourn the summons if it thought fit. If, however, the mortgagee only wanted possession, the originating summons was not available to him; his proper course was to proceed by writ in the King's Bench Division. "If delivery of possession only is sought an action for the recovery of land is the proper procedure."[43] As a result of such an action the order for possession would issue automatically unless, by some stipulation in the mortgage deed, the mortgagee's right to possession had not yet arisen, or unless the mortgagor could pay off the loan. As has been shown, if the King's Bench Division issued an order for possession, equity would not interfere.

In 1936 every action in which there was a claim for payment or possession by a mortgagee was assigned to the Chancery Division.[44] In consequence, Order 55, r. 5A, was amended and from that time the mortgagee could take out an originating summons in the Chancery Division and ask for possession alone. The Rule now reads: "Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage may take out as of course an originating summons, returnable in the chambers of a judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified and as the circumstances of the case may require; that is to say . . . delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in or alleged to be in possession of the property."[45]

The effect of the alteration in the rules of procedure was to make the Chancery Division, generally speaking, the sole arbiter in questions of the enforcement of rights under mortgages.[46] Was possession to be granted to a mortgagee automatically, as in the past? Apparently not. In the same year the Chancery judges added a Practice Direction which appears in the Note to Order 55,

[42] Manson, *The Builders of Our Law*, 2nd ed., p. 269.
[43] *Per* Eve J. in *Wallis* v. *Griffiths* [1921] 2 Ch. 301, at 304, following *Hill* v. *Stephens* (1887) unreported.
[44] Ord. 5, r. 5A, added by S.R. & O. 1936, No. 680.
[45] (With some later amendments whose provenance is not germane): *Annual Practice, 1961*, p. 1503.
[46] For county court jurisdiction, see *infra*, p. 294.

r. 5A. The relevant part reads: " When possession is sought and the defendant is in arrear with any instalments [47] due under the mortgage and the master is of opinion that the defendant ought to be given an opportunity to pay off the arrears, the master may adjourn the summons on such terms as he thinks fit. . . ." [48] One rubs one's eyes. The clear intent of this Direction appears to be: the mortgagee is asking for possession because his instalments are in arrear; if the mortgagor pays off the arrears no order for possession will be granted. The master may adjourn if he " is of opinion that the defendant ought to be given an opportunity to pay off the arrears." If the mortgagor does so, the Practice Direction obviously assumes that the master will then make no order for possession; for, if he intends to make such an order, why adjourn? Why not make an order straight away and let the mortgagee pay himself the arrears and principal out of the proceeds of sale? The Direction is appropriate to an age in which the right to possession exists merely to protect income payments; but once any such payment is two months in arrear then, in the absence of agreement to the contrary, the mortgagee's power of sale becomes exercisable.[49] That he should be prevented from exercising it by being deprived of the right to possession once those arrears are paid off is a novel proposition.

One writer has explained the Practice Direction thus: " When the Rules of Court were changed and it was provided (*inter alia*) that all such proceedings for possession were to be brought in the Chancery Division, the days of a mortgagee's absolute right to speedy possession were at an end; the interposition of a judicial discretion produced a result coinciding with the difference between the common law's view of a mortgage and equity's view." [50] But equity—as has been pointed out [51]—never assumed a discretion to prevent the mortgagee's taking possession unless the mortgagor could pay off *all* the debt. If the Chancery judges intend to invest their masters with any larger discretion, it may be objected, with the greatest respect, that the year is rather late and the method somewhat casual.

The amendment in procedure and consequent alteration of the rights of the parties were explained by Clauson L.J. in *Redditch Benefit Building Society* v. *Roberts*. " Those whose business it is to see that the procedure of the court is in accordance with what

[47] This apparently means instalments of principal and interest, for in the subsequent paragraph the Direction refers to " payment of interest or of an overdue instalment composed partly of interest and partly of principal."
[48] *Annual Practice*, *1961*, p. 1506.
[49] Law of Property Act, 1925, s. 103.
[50] R.E.M. in 73 L.Q.R., p. 17.
[51] *Supra*, p. 278.

is right and proper were rather perturbed by finding that, whereas on originating summons the facts and the circumstances of the case were brought before the court and in proper cases the wind was tempered to the shorn lamb, time being given for payment and so forth, in cases where relief was claimed by the issue of a writ in the King's Bench Division the relief was obtained automatically, without the matter coming before any judicial officer." [52] With great respect to the learned judge, his language is a little imprecise. He appears to be pointing to an anomaly: in the Chancery Division " relief " was subject to the court's discretion; it was not so subject in the King's Bench Division. But the word " relief " is deceptive. In Clauson L.J.'s argument it appears to cover the same remedy in each division of the court. In fact, however, " relief " in the Chancery Division meant possession plus some other remedy such as foreclosure [53] and in granting such joint remedies the court might well exercise a discretion. In the King's Bench Division, " relief " meant possession alone; and it has been established for many a year that this remedy is granted automatically unless the mortgagor can produce all the money due, or the mortgagee's right to possession has not, because of some special stipulation, come into effect.

For some time after this alteration in the Rules it seems to have been accepted that the mortgagee's right to possession had undergone a radical change; no longer was it automatic but was subject to the court's discretion to adjourn the summons to give the mortgagor time to pay off arrears. Thus the headnote to the case of *Hinckley and South Leicestershire Permanent Benefit Building Society* v. *Freeman* states categorically, " The court has an inherent power to adjourn for a definite period on such terms as it thinks just, a summons by a legal mortgagee for possession of the mortgaged property brought after the mortgagor has made default in payments due under the mortgage deed. There is nothing *ultra vires* in the direction of the Chancery judges to the masters. . . ." [54]

This was a case of a mortgage by demise to a building society, providing for the usual payment of principal and interest by instalments. The mortgagee was not to take possession until the instalments were thirteen weeks in arrear. Such default having been made, the society took out a summons for possession. The master adjourned the summons for three months, giving the plaintiffs liberty to apply during that period if the current instalments were not paid. The society contended that the master had no

[52] [1940] Ch. 415, at 420.
[53] *Wallis* v. *Griffiths*, *supra*, p. 285.
[54] [1941] Ch. 32.

power to make such an order and the matter was adjourned into court. As the mortgagor did not appear and was not represented, counsel for the Crown acted as *amicus curiae*. Farwell J., after reviewing the history of the remedy, stated that, " If the plaintiff proves that he is entitled to his order and that he is in fact in the position of a mortgagee who is entitled to possession he of course will get possession, and there is nothing in the Rules which can alter the right of a mortgagee, which he had before the Judicature Act and after the Judicature Act and which, in my judgment, he still has—to possession in proper circumstances." [55] The learned judge appears to have thought that he was asserting the mortgagee's right to possession. In fact his words are tautologous. He assures the plaintiff that he will get possession if he is entitled to it. But the plaintiff knows this. What he wants to know is why he is not entitled; what is improper about the circumstances; and this the judgment does not tell him. For Farwell J. then went on to mention the Practice Direction and gave judgment for the mortgagor, saying, " It is a novel proposition to me that this court has not power to adjourn any matter on any proper ground. No doubt the court would not postpone the hearing of a matter indefinitely because to do so might lead to defeating justice altogether; and a mere arbitrary refusal to hear a case is not a course which a judge would take or which would ever become a recognised thing. But to say that the court has not inherent power to direct that any matter which comes before it should stand over for a period if the court thinks that that is the proper way to deal with the matter is an entirely novel proposition to me. In my judgment the master had jurisdiction to make the order which he has made." [56]

This case was decided, then, on the narrow ground of the court's inherent power to adjourn any matter before it, and on this point it has received the approval of the Court of Appeal.[57] What may, however, be doubted is whether, on the facts, there was any " proper ground " for adjournment. The report of the case does not indicate whether the mortgagee's power of sale had arisen and become exercisable,[58] nor does it tell us the vital point—was the adjournment to give the defendant time to find the principal or merely to pay off the arrears? [59] The latter situation

[55] *Ibid.*, at 37, 38.
[56] *Ibid.*, at 38, 39.
[57] *Re Yates S.T.* [1954] 1 W.L.R. 564.
[58] We are told that the mortgage was in the " ordinary Building Society form " so presumably the power of sale was exercisable.
[59] The argument of counsel for the Crown suggests the one, the judge's final direction to the master (to make an order for possession " if satisfied that none of the payments have been made during the last three months ") suggests the other.

is explicitly envisaged by the Practice Direction [60]; yet it is submitted that, once the mortgagee's right to possession has arisen and his power of sale become exercisable, an adjournment to give the mortgagor time to pay off arrears is not within the proper limits of the court's discretion. The mortgagee may no longer be content to accept repayment by instalments; or, in the case of an ordinary building society mortgage, he may have agreed to stay out of possession only while instalments are duly and punctually paid. If the court adjourns his summons and the mortgagor pays off the arrears, is the mortgagee bound to accept them, incapable of enforcing his right to sell and put an end to the whole transaction because he cannot get possession?

The learned editors of the *Annual Practice* (up to 1958) in their gloss on the Practice Direction quoted *Hinckley, etc., B.S.* v. *Freeman* as authority for the proposition that the " court has an inherent power to adjourn a summons for possession for a definite period on such terms as it thinks just." This bald assertion has been considerably weakened by two, more recent, cases. In the earlier of them,[61] a charge by way of legal mortgage provided that principal and interest were to be paid by monthly instalments and the mortgagee covenanted, so long as the payments were punctually made, not to enforce the security. When the defendant fell into arrear the plaintiff called in the principal and sued for possession. The defendant paid off all arrears but could not find the principal. Upjohn J. was urged by the defendant's counsel to adjourn the summons for a year, but he declined to do so. In *Hinckley, etc., B.S.* v. *Freeman*, he observed, the learned judge " was concerned, and concerned solely, with the suggestion that there was no power in the court to adjourn at all. He never considered, for it was not before him, what would be the position if the plaintiff was still pressing for possession although it was proved that all arrears of instalments had been paid. That is the problem which I have to consider.

" In this case the plaintiff has clearly established the fact that the mortgage is presently enforceable. She is plainly entitled to repayment of the whole loan and interest outstanding and for that purpose to realisation of her security in order to repay herself the money due and in aid of her realisation to possession of the mortgaged premises. It seems to me clear, having heard argument on it, that I have no right to stand the matter over generally without the consent of the plaintiff although all arrears of instalments have been paid up, even on terms as to punctual payment in the future.

[60] *Supra*, p. 286.
[61] *Robertson* v. *Cilia* [1956] 1 W.L.R. 1502; [1956] 3 All E.R. 651.

That is so for two reasons. First, if I were to do so, I should be forcing the parties to an agreement that they never made, namely, to compel the plaintiff to accept repayment by instalments although the defendant's right to do so has long since lapsed. The judges' direction of 1936 was never intended to give the court power to do that and if that had been their intention the argument that the direction to do so was *ultra vires* would have succeeded. Secondly, if I were to do so, it seems to me that I should be postponing indefinitely the right of the plaintiff to have her case for possession tried on terms which I have no power to impose. That would amount to an arbitrary refusal to hear the case."

(Counsel for the defendant argued hardship and suggested adjournment for a year.) " That is an appeal to hardship and if I had the right to refuse relief to a mortgagee on the ground that greater hardship would be caused to the mortgagor I might well refuse to make an order for possession in this case, but Parliament has not thought right to give the court power to interfere between mortgagor and mortgagee on that ground. No doubt, I have power to adjourn for a reasonable period to give the mortgagor an opportunity of trying to find the means of discharging the loan altogether. That was the whole object of the 1936 alteration, namely to prevent a mortgagee from turning a mortgagor out of possession almost literally overnight without giving him an opportunity to meet and try to satisfy his creditor." [62]

The learned judge thus confines the direction to cases where the mortgagor is to be given the opportunity of " trying to find the means of discharging the loan altogether." What the Direction says is, " if the master is of opinion that the defendant ought to be given an opportunity to *pay off the arrears*, he may adjourn the summons . . ." [63] and it contains no suggestion that the court may not adjourn if the plaintiff is still pressing for possession.[64] It is submitted, with respect, that Upjohn J.'s judgment is perfectly consonant with principle and authority. But if that be the case, what is left of the Practice Direction? Once a mortgagee has to ask the court for possession he will probably want to sell, will no longer be prepared to receive payment by instalments, and will oppose successfully, according to *Robertson* v. *Cilia*, any application for adjournment. It seems, moreover, that the learned editors of the *Annual Practice* now recognise this; for in place of the old gloss [65] now appears the much more cautious observation —" The provisions in the Practice Directions as to adjournment

[62] [1956] 3 All E.R. 651 at 654–655.
[63] Italics added.
[64] As he was in *Hinckley, etc., B.S.* v. *Freeman.*
[65] *Supra*, p. 289.

on terms apply only where the principal and interest are repayable by commuted periodical sums and the mortgagee has precluded himself from going into possession so long as those sums are paid." [66] The authority which supports this new explanation is the case of *Fourmaids Ltd.* v. *Dudley Marshall Properties Ltd.*[67]

In that case, by a registered mortgage, it was provided that interest was to be paid half-yearly, and if each instalment were punctually paid, the principal would not be called in for some thirty-four months. The mortgagor (who was at all times in possession) failed to pay the first instalment until after the issue of a writ therefor in the Queen's Bench Division. Some three months after the arrears had been paid, the mortgagee took out an originating summons for possession. At the mortgagor's request, the summons was adjourned into court, where it came before Harman J. (as he then was). Counsel for the mortgagor relied on the Practice Direction to show that the court had power to adjourn. The learned judge, after observing that the subject was one which was " constantly being agitated " pointed out that it was an " entire misapprehension " to assume that an originating summons for possession " involved some kind of default on the part of the mortgagor." " The mortgagee," he stated, " may go into possession before the ink is dry on the mortgage unless there is something in the contract express or by implication whereby he has contracted himself out of that right. He has the right because he has a legal term of years in the property or its statutory equivalent. . . . If there is a provision that so long as certain payments are made he will not go into possession then he has contracted himself out of his rights. Apart from that, possession is a matter of course." [68]

The learned judge then attributed most of the confusion surrounding the matter to the alteration of the rules in 1936 and stated that the Practice Direction " is limited to what are by far the most frequent forms of mortgage, those whereby the principal as well as the interest is repaid by the mortgagor by commuted weekly or quarterly sums and whereby the mortgagee precludes himself, so long as those weekly or other periodical sums are paid, from going into possession." [68] He concluded by stating that " the mortgagor has entered into a contract with the mortgagee and, if the mortgagee asked for his rights under the contract, this court in my judgment has no power to refuse him those rights " [69] and doubted whether the master had authority to defer the summons for even two months.

[66] *Annual Practice, 1961*, p. 1510.
[67] [1957] Ch. 317.
[68] *Ibid.*, at 320.
[69] *Ibid.*, at 321.

The result of this case, and of *Robertson* v. *Cilia* [70] is, it is submitted, to establish that the alteration in procedure in no way alters the mortgagee's right to immediate possession. If he has not covenanted to allow the mortgagor to remain in possession he may take it " before the ink is dry on the mortgage " and the court will no more hinder him now than it would in the past. If he has covenanted to allow the mortgagor to remain in possession, and if nothing has happened to deprive the mortgagor of the benefit of such a covenant, the mortgagee will now, as in the past, fail to get an order. There remains the normal type of building society mortgage (to which Harman J. confined the Practice Direction) where the mortgagor is to pay off the debt and interest by instalments and the mortgagee expressly agrees not to take possession while such instalments are punctually paid. Every well-drawn building society mortgage, however, provides that, as soon as the instalments are at all seriously in arrear,

(a) the principal shall become payable,
(b) the power of sale shall become exercisable [71] and
(c) the right to possession shall arise.

In such a case, once default is made in the payment of instalments, the mortgagee should get possession; and, if he presses for it, the court will have no power to adjourn the summons to give the mortgagor time to pay off the arrears.[72] The status *quo ante* cannot be restored and, as a building society which has once had trouble in collecting instalments is unlikely to agree to give the mortgagor another chance, it would appear that the Practice Direction, though formidable in appearance, is in effect a nullity.

The latest case on this topic does little to dispel the difficulties. In *Braithwaite* v. *Winwood* [73] Cross J. considered the Practice Direction and assumed that it gave him a discretion, but in fact refused to delay the order for possession. He cited *Hinckley, etc., B.S.* v. *Freeman* and quoted with approval the statement in *Robertson* v. *Cilia* to the effect that the court had power to adjourn to allow the mortgagor to find the means of discharging the loan altogether; but he expressed doubt as to whether the Practice Direction must—as was suggested in the *Fourmaids* case —be confined to mortgages repayable by instalments. The learned judge did not, however, distinguish between

[70] Which was not referred to in the judgment of Harman J. in the *Fourmaids* case.
[71] In the absence of express agreement it is exercisable when an instalment which includes interest is in arrear for 2 months: *Walsh* v. *Derrick* (1903) 19 T.L.R. 209.
[72] *Robertson* v. *Cilia*, *supra*, p. 289.
[73] [1960] 1 W.L.R. 1257.

(a) an adjournment to give the mortgagor time to pay off the whole loan. This depends, apparently, on the court's inherent power and in any case could hardly be conferred by a Practice Direction which purports to give the master power to adjourn if " of opinion that the defendant ought to be given an opportunity to pay off the arrears ";

(b) an adjournment to give the mortgagor time to pay off arrears. The power to do this is what the Practice Direction tries to confer; and it is submitted that the evidence adduced throughout this article shows that the attempt fails.

It must be admitted that this lack of a wide judicial discretion to adjourn a mortgagee's summons for possession may cause hardship. One such case, the possibility of which is not infrequent, is that of a vendor who leaves the bulk of the purchase-money on mortgage. As every practitioner knows, a vendor who is prepared to wait for his money can command an appreciably higher price than one who needs cash down. This is especially so in the case of older properties on which professional mortgagees will not make large advances. Thus a house whose market value is £2,000 may well fetch £2,500 if the vendor is prepared to leave, say, £2,000 on mortgage. Having taken the £500 cash and entered into the " old-fashioned " type of interest-only mortgage, what is to prevent him, when the contractual date for repayment has passed and his power of sale arisen, from calling the loan in. If default is made for the statutory time [74] he can take out a summons for possession, which the court will have no power to adjourn, get an order, sell, and pay off his loan and costs, thus emerging with an extra £500.[75] No doubt the mortgagor considers that there is a " tacit agreement " that he should remain in possession, and no one will be more surprised than he to receive the demand for the principal.[76] But to refuse the mortgagee possession is, as has been shown, outside the court's discretion. The remedy would seem to lie in the hands of the prospective purchaser-mortgagor. He may either stipulate, *simpliciter*, that the mortgagee shall not take possession or call in the loan for a definite period—which is likely to be difficult—or insist on making payment by instalments of principal and interest and provide that the mortgagee shall not enforce his security while such instalments are punctually paid.

74 3 months: Law of Property Act, 1925, s. 103 (i).

75 Any deficiency on the sale can be made the object of a personal action.

76 He might try to invoke the doctrine of quasi-estoppel, relying on the vendor's conduct as the promise and the purchase as the detriment. The possibility is faint, however, for apparently the promise operates only to suspend rights already existing: *City & Westminster Properties Ltd.* v. *Mudd* [1959] Ch. 129. But, technically at least, the purchase (*i.e.*, the detriment) precedes the mortgage: *Church of England Building Society* v. *Piskor* [1954] Ch. 553.

Even this will not easily be imposed on an unwilling vendor and if he does contemplate calling in his money in the near future and making a quick profit he is unlikely to agree. Refusal, however, would at least be a warning to the purchaser's solicitor; and his duty would clearly be to explain the risk to his client.

The county court

It has been held recently that a mortgagee's action for possession is an "action for the recovery of land" and not "for enforcing a charge" for the purpose of determining the jurisdiction of the county court.[77] The result is that, whatever the amount owing, the county court has jurisdiction if "the net annual value for rating of the land in question does not exceed £100."[78] Thus, in practice, almost all dwelling-houses in the country are covered. The Divisional Court reached this conclusion with satisfaction since, as Lord Goddard C.J. put it, "persons who take mortgages from building societies are generally . . . not within . . . the higher income brackets, and it would be very unfortunate if . . . they were to be made liable for costs in the High Court."[79]

It may be surmised, however, that it is not only mortgagors who have cause to welcome this decision. The practical advantages to mortgagees are no less considerable; for it appears that the county court does not assume a special discretion to adjourn a mortgagee's summons or to refuse him possession. The court is given power to adjourn[80] or to postpone the execution of an order for possession[81] but the cases (which are largely concerned with landlord-tenant actions) establish that the court's discretion is limited to preventing immediate hardship.[82] The rule dealing with mortgagees' applications for possession[83] contains nothing approximating to the Practice Direction to R.S.C., Ord. 55, r. 5A,[84] and it may be assumed that, for that reason alone, any mortgagee who can will prefer to apply to the county court.

Summary

The argument above seeks to show that:

(i) the mortgagee's right to possession is, in the absence of

[77] *R.* v. *Judge Dutton Briant* [1957] 2 Q.B. 497 (D.C.).
[78] County Courts Act, 1959, s. 48 (1).
[79] *R.* v. *Judge Dutton Briant*, *supra*, at p. 507.
[80] County Courts Act, 1959, s. 35; County Court Rules, Ord. 13, r. 4 (1).
[81] County Court Rules, Ord. 25, r. 72.
[82] *Sheffield Corporation* v. *Luxford* [1929] 2 K.B. 180; *Jones* v. *Savery* [1951] 1 All E.R. 820; *Air Ministry* v. *Harris* [1951] 2 All E.R. 862.
[83] County Court Rules, Ord. 7, r. 7 (2).
[84] *Supra*, p. 285.

agreement to the contrary, absolute—enforced by the common law, unhindered by equity;

(ii) the transfer to the Chancery Division of the procedure for enforcing this right in no way weakened it;

(iii) the Practice Direction, which apparently invests the court with a wide discretion to adjourn a mortgagee's summons for possession to give the mortgagor time to pay off arrears of instalments, cannot be reconciled with principle nor upheld by authority. The court has, however, a discretion to adjourn for a minimal period to allow the mortgagor time to pay off the whole debt.[85] This cannot be conferred by the Practice Direction, since that is only concerned with payment of arrears, and must rest on the general power, inherent in the court, to adjourn any matter before it.

In conclusion, it may be observed that the present movement towards a " property-owning democracy " is bound to impose a strain on the traditional mortgage relationship. Today, more dwelling-houses than ever before are being built, and the vast majority of them are bought with the aid of a mortgage. The affluence of the ordinary man in our society is largely potential; and therefore a free flow of credit, enabling him to replace his loan at short notice, becomes a vital element in the economy. Its absence (the " credit squeeze ") places the borrower in a position of almost servile dependence on the patience of the lender. In these circumstances it is not surprising that the courts seek to protect the mortgagor by assuming a jurisdiction to adjourn the mortgagee's summons for possession. This is particularly true of the District Registrars, before whom most applications come, and who tend, perhaps, to be somewhat sceptical of the misgivings felt by the more academic. Of course, it is no new thing to find the judiciary using the tactics of procedure to outflank positions which appear legally impregnable. In this particular case one applauds them for it; but it is unfortunate that their weapon—the Practice Direction—should be so unsatisfactory. Surely the time is ripe for a legislative revision of the whole concept of the mortgage, one which would take into account both legal and economic factors. The present machinery by which the security is effected is cumbrous, and the resulting position of the parties is rapidly becoming archaic. The problem is difficult, for any detraction from the mortgagee's rights lessens the incentive to lend. But the answer must be found.

[85] " 28 days is the ordinary time ": *per* Harman J. in the *Fourmaids Case* [1957] Ch. 322.

RATING VALUATION

By W. A. Leach, f.r.i.c.s.

ARTICLE 3

References in this article to clause numbers, etc., in the "new Bill" are to the Bill as amended on Report in the House of Lords (Bill No. 111). These will probably be the correct references to sections, etc., in the Act as passed. The two previous articles are brought up to date in this and other respects in Supplementary Notes at the end of this article.

VII. Valuation Procedure

Preparation of valuation list

87. A valuation officer is to prepare a new list for each rating area in his valuation district and sign the same not later than the end of December in the year before its coming into force, or before such later date as the Minister may allow.[1] Thus the 1963 lists will normally have to be prepared and signed not later than December 31, 1962. Before the same date the valuation officer is to send a signed list, together with a copy thereof, to the rating authority, who are immediately to take such steps as they think most suitable for giving notice of the list and the rights to inspect the same and make proposals for the alteration thereof.[2]

Rights of inspection

88. Rights of inspecting a new list and taking copies thereof and extracts therefrom are given by section 60 (1) of the 1925 Act, applied to London by section 61 of the 1948 Act. Under section 60 (1) any ratepayer (whether in the area to which the list relates or elsewhere) may at all reasonable times without payment [3] inspect and take copies and extracts from any rate book,[4] draft list, valuation list and certain other documents which the authority may hold in connection with present or past assessments and rates.[5]

1 1955 Act, s. 1 (3). A valuation list is not invalidated by the omission therefrom of any matter required to be included therein (1955 Act, s. 1 (5)).
2 1955 Act, s. 1 (6). As to proposals, see para. 94.
3 Where the documents, etc., are more than ten years old a charge of 2s. 6d. per document may be made under the Rating and Valuation (Inspection of Documents) Rules, 1927.
4 To assist mechanisation cl. 14 of the new Bill will dispense with the requirement that rate books are to be kept.
5 As to the production of returns, see para. 121.

Amendment of list before coming into force [6]

89. There is no right of appeal against a valuation list before it has come into force, but the valuation officer may amend it after it has been transmitted to the rating authority and before it has come into force if it appears to him to be necessary to do so by reason of a material change of circumstances since the time of the valuation.[7] " Material change of circumstances " means the coming into occupation of a newly erected or newly constructed hereditament or of any hereditament which has been out of occupation on account of structural alterations, or a change of circumstances consisting of any of the events specified in (b) to (g) of para. 102. The " time of the valuation " means for this purpose the time by reference to which the valuation officer prepared the list so far as it is affected by the change of circumstances. This would seem to mean the date on which the valuation officer made the particular valuation.

90. All other amendments to a list must come through the procedure provided for amending it after it has come into force.[7a]

Amendment of list after coming into force [6]

91. After a list has come into force the amendment thereof may be sought at any time by the valuation officer or any person aggrieved by the list making a proposal for its amendment.[8]

Liability for rates where new assessments opposed

92. Where (a) the value ascribed to a hereditament in a new list is higher than that last previously determined, (b) there has since then been no substantial alteration in the hereditament, and (c) a proposal has been made for an amendment of the new list within six months of its coming into force, the rates recoverable for that or any subsequent year until the proposal has been settled [9] are not to

[6] The next lists will come into force on April 1, 1963. See para 2, *ante* (Article 1). [7] 1955 Act, s. 1 (4). [7a] See notes 8 and 23 (ii).

[8] Para. 94. Where a hereditament has ceased to exist a valuation officer may, at the request of the rating authority, delete it from the list (power with effect from one month after the passing of the new Bill: Sched. IV, para. 1). Cl. 7 of the new Bill provides an informal method of apportionment of rateable value where part of a hereditament becomes unoccupied, but is only likely to remain so for a short time. The rating authority (only) may request the valuation officer to apportion the rateable value and if his figures are agreed by the authority and the occupier, the rateable value apportioned to the occupied part will be as binding as if ascribed thereto in the valuation list. The apportionment will endure until the unoccupied part is re-occupied or a further apportionment made. As water rate is charged on net annual value where different from rateable value, the informal apportionment under cl. 7 will often be of no advantage for purposes of that rate.

[9] A proposal is settled when the list has been altered to give effect thereto or to an agreement made in consequence thereof, or where the proceedings on an appeal against an objection to a proposal have been finally determined (including any proceedings arising thereout of) or the proposal has been withdrawn (1955 Act, s. 1 (8)).

exceed those payable for the last year before the coming into force of the new list plus half the increase which would otherwise have been recoverable.[10] Where the rate of deduction (if any) from net annual value to rateable value [11] made in the old list exceeds the rate of deduction applicable in the new list, the rates payable for the last year before the new list came into force are to be taken to have been what would have been payable had the new rate of deduction applied.[12]

93. The foregoing provisions do not apply to a proposal made by an occupier where a previous proposal has been made by an occupier of any part of the hereditament or made by an owner rated by agreement or compulsorily under section 11 of the 1925 Act where a previous proposal has been made by an owner of the hereditament.[13]

Making a proposal

94. Any person aggrieved [14] by a valuation list in force:

(a) by the inclusion of any hereditament in a list;

(b) by a value ascribed to a hereditament in a list or any other statement made or omitted to be made in a list with respect to the hereditament; or

(c) in the case of a building or part of a building occupied in parts, by the inclusion thereof in a list as a single hereditament [15];

may at any time [16] make a proposal for the alteration of the list.[17]

[10] 1955 Act, s. 1 (7), and new Bill, cl. 16 (2) and (4). See also para. 101, note 54.
[11] Paras. 13 and 14.
[12] New Bill, cl. 16 (5).
[13] New Bill, cl. 16 (3).
[14] A person liable to repay a ratepayer the rates he pays may be a person aggrieved: *R.* v. *Brentford Union A.C., ex p. Herring* (1907) 71 J.P. 281; also a person who would have a *locus standi* before the court when the case came on and who thinks that he can or may be able to support a case: *R.* v. *Exeter A.C.* (1948) 112 J.P. at 457. A person is aggrieved if his legal rights are adversely affected: *Re Sidebottom* (1880) 14 C.D. 458; or if his property interests have been prejudicially affected: *Burke* v. *Ministry of Housing and Local Government* (1956) 167 E.G. 219.
[15] See para. 97, note 23 (iii).
[16] There is no *res judicata* in a rating appeal by reason of a decision affecting an earlier valuation list given between the same parties, on the same facts, involving the same issues, and relating to the same hereditament: *Society of Medical Officers of Health* v. *Hope* (1960) 53 R. & I.T. 102, H.L. This also applies to such an appeal in a different rating period but in respect of the same list: *ibid.* at p. 103. Possibly there is *no res judicata* on questions of fact in the same rating period, but on the same facts the Tribunal would give the same decision: *Harold* v. *Rickmansworth U.D.C.* (1955) 48 R. & I.T. 227, L.T. If there is fresh evidence it will be taken into consideration: *Re Peak's Appeal* (1959) 52 R. & I.T. 8, L.T. The disposal of a proposal made by a ratepayer for a reduction of assessment did not prevent a proposal being made by the valuation officer in the same rate period for an increase in the assessment: *Thompson* v. *Amys* (1959) 52 R. & I.T. 549.
[17] 1948 Act, s. 40 (1).

A valuation officer may at any time make a proposal for *any* alteration of a list.[18] A rating authority has a qualified right to make a proposal for the addition to a list of a hereditament omitted therefrom [19] and, of course, has the ordinary rights of a ratepayer as regards the hereditaments it occupies. It will also be able, as regards future lists, to make a proposal as a person aggrieved by any inaccuracy in the list for its area under (a), (b) or (c) *supra*,[20] the provision to the contrary in the 1959 Act applying only to the lists which came into force in 1956.

95. By sections 41 and 63 of the 1948 Act as modified by section 2 and Part I of Schedule I to the 1955 Act, a proposal must be in writing [21]; unless made by the valuation officer it is to be served upon him and may be served by post; it must specify the grounds on which it is supported and it must comply with any regulations made by the Minister.[22] It is provided in para. 4 of Schedule IV to the new Bill that a proposal may be made contingent upon the alteration of an assessment in pursuance of an earlier proposal (this to have effect from one month after the passing of the Bill).

96. Section 64 of the 1948 Act as amended by para. 8 of Schedule IV to the new Bill provides that a number of hereditaments may be included in one proposal if owned or occupied by the same person or comprised in the same building (the conditions after " if " will have effect from one month after the passing of the Bill).

97. A form of proposal as prescribed by the Minister may be obtained from the valuation officer for the rating area and will be found to be adapted for the three ways in which a person may claim to be aggrieved by a list as specified in (a), (b) and (c) of para. 94. It will be noted that (b) covers two matters, (i) the value of the hereditament in question and (ii) other statements in or omissions from the list in respect thereof.[23]

18 1948 Act, s. 40 (2).

19 1955 Act. s. 2 (1), adding subsection 2A to s. 40 of the 1948 Act.

20 *Grainger* v. *Liverpool Corpn.* [1954] 1 Q.B. 351, D.C.

21 As to " writing," see Interpretation Act, 1889, s. 20.

22 The only regulations made by the Minister are those prescribing the form of a proposal: S.I. 1955, No. 1761. Whereas the statutory provisions noted in para. 95 apply to all proposals the Regulations do not apply to proposals made by a valuation officer (reg. 3).

23 (i) Every misdescription is not a material error requiring a proposal to be made: *Speed* v. *Mark* (1958) 51 R. & I.T. 370, L.T. (hereditament described as " house and garage " but garage not used as such); *Quinn* v. *Davey* (1958) 51 R. & I.T. 385, L.T.; *Griffel* v. *Clarke* (1960) 53 R. & I.T. 350, L.T. (1st and 2nd floor dwelling described as " flat ").

(ii) A valuation officer may correct a clerical or arithmetical error in a list after giving notice to the occupier and rating authority (1948 Act, s. 43).

(iii) Where a proposal is made that two or more assessments should be merged and amended it has been held that this enables the court to merge the assessments and amend the gross value to any amount between that

98. The statutory form of proposal requires the alteration [24] proposed to be specified (it could hardly be left at large [25]) together with the grounds on which the proposal is supported (following the statutory provisions). The proposer will be limited in an appeal to the local valuation court or the Lands Tribunal by the nature of the proposal and the supporting grounds therein specified [26]; it will not then be possible for him to introduce new grounds and these must accordingly be broadly phrased. Following the order set out in para. 94, the nature of the proposal and the supporting grounds might be:

(a) the deletion from the list of the hereditament and its assessment, the hereditament comprising only agricultural land (this is only one possible example);

proposed and the aggregate of the separate assessments: *British Home Stores* v. *Burton* (1958) 51 R. & I.T. 665, L.T. If merger and amendment can be proposed presumably division and amendment could be, but the express provision for the latter (para. 94 (c)) suggests otherwise where the proposal is not made by the valuation officer (para. 94). Even in the latter case the merger really means the deletion of two entries from the list and the insertion of one new entry, for which purpose two proposals (on one form, para. 96) would seem to be more correct, *i.e.*, a proposal to delete the existing entries and a proposal to insert a new entry.

(iv) Where, following physical alterations, a proposal was made for the deletion of the existing assessment and the insertion of a new one, it was held that the inference was that the old hereditament had gone out of existence and a new one created and that the new assessment could be fixed by the court at any level between the amount proposed and nil: *Merrifield Social Club* v. *Pritchard* (1960) 53 R. & I.T. 504, L.T.; *Godstone R.D.C.* v. *Henning* (1961) 1 R.V.R. 215, L.T. A hereditament is the thing assessed *sic stantibus* (para. 17 (g), *ante* (Article 1), note 12 (i)), and accordingly comprises premises having a certain physical form and a certain user; therefore, a hereditament must cease to exist if by physical alterations and change of user it ceases to be substantially the hereditament as it stood at the date of valuation and a new hereditament must come into existence. Accordingly, the proper course would seem to be to make a double proposal for the deletion of one entry and the insertion of a new entry for the new hereditament valued anew *rebus sic stantibus*: see also *S. Thomas & Co. (Nottingham) Ltd.* v. *Emmett* (1955) 48 R. & I.T. 761, L.T. A proposal simply to amend the assessment would seem to be of doubtful validity but s. 42 (para. 102 (b), *post*) may suggest otherwise, at any rate unless the alterations are far reaching: a hereditament is not necessarily the same hereditament just because the brief words of description in the list need not be changed.

24 "Alteration" includes an insertion in or deletion from a list (1948 Act, s. 144 (9)); see also *John Walsh Ltd.* v. *Sheffield Corpn.* (1957) 50 R. & I.T. 706, C.A.

25 See para. 99.

26 *Williams* v. *Bedminster Union* (1874) 29 J.P. 117; *R. London JJ.* [1897] 1 Q.B. 433; *Ellerby* v. *March* (1954) 47 R. & I.T. 335, L.T.; *Re Jones' Appeal* (1951) 44 R. & I.T. 70, L.T.; *Hardiman* v. *Crystal Palace Football Club* (1955) 48 R. & I.T. 91, L.T.; *William Gunstone & Son Ltd.* v. *Sheffield City Council* (1957) 51 R. & I.T. 25, L.T. (only issues raised by proposal may be raised by objector thereto). A party to an appeal is not, however, tied before the Lands Tribunal to the same substantive points taken or evidence given before the local valuation court: *S. Aston & Sons* v. *Charles* (1953) 46 R. & I.T. 446, L.T.; but the introduction of new points and evidence may affect costs. See also Lands Tribunal Rules, 1956 (No. 1734), r. 33.

(b) (i) the reduction of the assessment as inserted in the list,[27] the value ascribed to the hereditament therein being incorrect,[28] unfair and excessive;

(ii) the amendment of the description of the hereditament in the list,[23] the existing description being incorrect;

(c) the separate assessment of parts of a hereditament entered in the list as a single hereditament, the single assessment contained in the list being contrary to law and unreasonable in all the circumstances.[29]

99. The " alteration proposed," as referred to in para. 98, means, in a proposal as to value, the direction in which a change is sought, *i.e.*, an increase or reduction in the assessment, and it may not be necessary to state the new assessment desired or to quantify the amount of the amendment sought,[30] but except when serving a proposal near the end of a rate period,[31] when there is insufficient time to consider the position fully before it is served, it may save time and expense to suggest a figure " without prejudice " in a covering letter sent with the proposal. In other cases, as where an amended description or separate assessments of parts of a hereditament are sought, the proposer should specify what he desires, *e.g.*, separate assessments should be made for the ground floor and for the first and second floors combined.

Procedure following a proposal

100. A proposal will be sufficient to bring about an alteration of

27 It may not be essential to give figures (see para. 99), but it is advisable to do so: *Ryde on Rating*, 10th ed., p. 746. If a gross value is proposed, the Tribunal is not debarred from finding net annual value direct in a proper case (para. 12, *ante* (Article 1)): *Hardiman* v. *Crystal Palace Football Club*, *supra*.

28 An assessment which is excessive is incorrect, but " incorrect " may mean too high or too low and should not be used alone. " Unfair " is also ambiguous since an assessment which is too high or too low is unfair and every form of unfairness is not a ground for a proposal; see para. 31. The three words " incorrect, unfair and excessive " are commonly combined as permitting a wide range of argument and evidence at a hearing. In *Re Williamson's Appeal* (1959) 52 R. & I.T. 106 (L.T.) the Lands Tribunal said that greater weight would be attached to a grievance affecting amenity if expressed in the grounds of the proposal, but there is no statutory requirement that the grounds shall be specific and the weight to be attached to any evidence depends on the evidence and the person giving it. However, if any special ground will be particularly relied upon it would be advisable to add it to the general grounds in case the local valuation court adopts the same view.

29 See note 41, *ante* (Article 2). This case would apply, *inter alia*, to houses let in parts but treated as single hereditaments as described in para. 59, and it is in these cases that the words " unreasonable in all the circumstances " would be especially applicable.

30 *Jollys (Oldham) Ltd.* v. *Almond* (1951) 44 R. & I.T. 374, L.T.

31 A successful proposal normally has effect from the commencement of the rate period in which it is served so that near the end of a period it may be vital to serve a proposal as quickly as possible: see para. 102.

the valuation list concerned unless it is objected to [32] in accordance with the prescribed procedure. The following are the provisions as to objection and as to further procedure in relation to a proposal according to whether or not an objection is made:

(i) Within seven days of making, or twenty-eight days of receiving, a proposal the valuation officer is to transmit a copy thereof to the occupier of the hereditament and the rating authority,[33] an owner rated compulsorily or by agreement under section 11 of the 1925 Act or section 3 or 4 of the Poor Rate Assessment and Collection Act, 1869,[34] and the owner of unoccupied premises ranking as an occupier.[34]

(ii) Within twenty-eight days of service of a copy proposal on the occupier (including an owner as in (i)) any owner or occupier of the hereditament or any part thereof may object to the proposal; similarly within twenty-eight days of service of a copy proposal on the rating authority as such, the authority may object. In either case the objection is to be served on the valuation officer.[35]

(iii) Within twenty-eight days of receiving an objection the valuation officer is to transmit a copy thereof to the maker of the proposal.[36] (See (viii) *infra*, as to position where the valuation officer objects to a proposal.)

(iv) Under the new Bill,[37] if a proposal is made after October 1, 1961, and, before it is settled, a further proposal is made otherwise than by an occupier,[38] then if the occupier does not object thereto within twenty-eight days of being served with a copy thereof, he is to be deemed to have objected on the last day for doing so.

(v) If a proposal was made by the valuation officer or if he is satisfied that a proposal not made by him is well founded, and in either case no objection has been made thereto or every objection has been unconditionally withdrawn, he is to cause the list to be altered to give effect to the proposal.[39]

32 There is no prescribed form of objection and no requirement to state the grounds of objection *Cf.* para. 129.
33 1955 Act, Sched. I, Part I.
34 1948 Act, s. 66.
35 1955 Act, Sched. I, Part I.
36 *Ibid.*
37 Presumably "occupier" includes an owner as in (i) of para. 100 (1948 Act, s. 66).
38 New Bill, Sched. IV, para. 5 (1).
39 1955 Act, Sched. IV, Pt. II (4).

(vi) If " all the persons whose agreement is requisite " [40] agree as to the alteration to be made in the list in respect of a proposal without, or before the determination of an appeal to the local valuation court, the valuation officer is to cause the list to be amended accordingly.[41]

(vii) If there remains any objection which has not been withdrawn unconditionally or if the proposal has not been withdrawn and (v) or (vi) *supra* is not applicable, the valuation officer must, during or at the end of a period of six months [42] beginning with the " relevant date " [43] transmit to the clerk of the appropriate valuation panel a copy of the proposal and every notice of objection or deemed objection [43a] not unconditionally withdrawn [44] together with notification of any deemed objection as referred to in (iv) *supra*. This has the effect of an appeal: (xi) *infra*.

(viii) If the proposal was not made by the valuation officer he may, within five months [45] of the relevant date,[46] give notice (a) of objection to the proposal and (b) that if the proposal is not withdrawn within fourteen days, the proposer will be treated as intending to appeal against the objection. If the proposal is not withdrawn within the fourteen days, the valuation officer must, within not less than fourteen or more than twenty-eight days of the giving of the notice, transmit a copy of the proposal and his notice of objection thereto, together with any other objection which has not been unconditionally withdrawn, to the clerk to the appropriate local valuation panel.[47] This has effect as an appeal: (xi) *infra*.

(ix) If at the end of six months [48] from the " relevant date " [49]

40 The " persons whose agreement is requisite " are the valuation officer, the proposer, any objector whose notice of objection has not been unconditionally withdrawn, the occupier of the hereditament, and the rating authority (1955 Act, Sched. I, Pt. II (8)).

41 1955 Act, Sched. I, Pt. II (5).

42 On and after the first anniversary of the coming into force of a valuation list the periods of six months and five months in Part II of Sched. I to the 1955 Act are to be reduced to four months and three months (new Bill, Sched. IV, para. 3 (3)). The pressure of work on the valuation officer from proposals would naturally be heaviest in the first year after a list has come into force.

43 The " relevant date " is the date of the proposal if made by the valuation officer and the date of service on the valuation officer in the case of any other proposal.

43a 1961 Act, Sched. IV, para. 5 (1); see para. 100 (iv), *ante*.

44 1955 Act, Sched. I, Part II (6) (*a*).

45 See note 42, *ante*.

46 See note 43, *ante*.

47 1955 Act, Sched. I, Pt. II (6) (*b*) and (*c*).

48 See note 42.

49 See note 43.

no notice of objection has been given by the valuation officer under (viii) *supra* and either no notice of objection has been given under (ii) *supra* or every such objection has been unconditionally withdrawn, the valuation officer is to be taken to be satisfied that the proposal is well-founded and to cause the list to be altered to give effect to the proposal.[50]

(x) On transmitting a copy of a proposal to the clerk of a local valuation panel the valuation officer is forthwith to notify the fact to the proposer, any objector to the proposal and the local authority.[51]

(xi) The transmission under (vii) or (viii) *supra* of a copy of a proposal will have effect as an appeal to the local valuation court by the maker of the proposal against every objection of which a copy notice has been transmitted under (vii) or (viii),[52] *i.e.*, the proposer becomes the appellant.

Effect of a proposal

101. Except as noted in para. 92 and note 8 to para. 91, any rate for which the valuation list is conclusive is to be made and levied in accordance with the list in force from time to time and will be collectible and recoverable accordingly.[53] The amount levied is to be adjusted where an alteration is made in a valuation list in pursuance of a proposal.[54]

102. Generally, any alteration [55] of a valuation list in pursuance of a proposal takes effect from the beginning of the rate current when notice of the proposal was served[56]; but in the following cases the amendment will only have effect from the date (if later than the commencement of the rate period) on which the new or altered hereditament came into occupation or the happening of the event which was the reason for the alteration:

(a) erection of a new building or existing building out of occupation owing to structural alterations [56a];

50 1955 Act, Sched. I, Pt. II (6) (*d*).

51 1955 Act, Sched. I, Pt. II (7).

52 *Ibid.*

53 1948 Act, s. 51, as amended by 1955 Act, Sched. V, Pt. III. See also para. 91, note 8.

54 1948 Act, s. 42 (3). A person who ceased to own or occupy a hereditament before the date of service of a proposal will not be entitled to any refund of rates on the reduction of an assessment in consequence of the proposal (new Bill, Sched. IV, para. 6 (1), with effect as regards proposals served after one month after the passing of the Bill).

55 See para. 98, note 24.

56 1948 Act, s. 42.

56a As to advertising stations see Supplementary Note to para. 81.

(b) change of value due to structural alterations or total or partial destruction of heraditament by fire or otherwise [56b];

(bb) hereditament becoming or ceasing to be a dwelling-house, private garage or private storage accommodation as defined in section 3 of the 1953 Act or being used to a greater or less extent than previously for the purposes of a private dwelling or dwellings [57];

(c) hereditament becoming or ceasing to be an agricultural, industrial or freight transport hereditament;

(d) hereditament becoming or ceasing to be liable to be rated,[58] *e.g.*, Crown property;

(e) (relates to railways and canals);

(f) and (g) property assessed as single hereditament becoming assessable in parts and vice versa.

103. Although a proposal may operate retrospectively, the value of a hereditament affected thereby is to be determined in accordance with evidence existing at the date the proposal is made and not the date from which an alteration of the list would have effect.[59]

Local valuation courts

104. The function of a local valuation court is to determine appeals of which notice has been given to its clerk as set out in para. 100.[59a] The court is to consist of the chairman, or one of the deputy chairmen, of the local valuation panel and two other members of the panel, the panel being constituted under a scheme prepared by the council of the county or county borough in which the panel is to operate.[60] With the consent of all parties to a hearing, the court may consist of any two of the specified persons, the case to be heard by another court if the two fail to agree.[61] The purpose of this provision is to enable the court to proceed if there is not a full court in attendance, as when a member is unexpectedly absent or detained on other business. Under para. 10 of Schedule IV to the 1961 Act regulations may be made by the Minister whereby hereditaments which are in the same curtilage or are contiguous and in the same occupation but are not within

56b A nominal value may be placed on a hereditament during alterations: *British Advent Mission* v. *Cane* (1955) 48 R. & I.T. 60. As to advertising stations see Supplementary Note to para. 81.

57 (bb) was added by 1955 Act. Sched. VI, Pt. III.

58 Substituted by 1955 Act, Sched. VI, Pt. III.

59 *Barratt* v. *Gravesend A.C.* [1941] 2 K.B. 107.

59a Including appeals against deemed objections (para. 100 (iv), *ante*); but appeals in respect of earlier proposals must be settled first (1961 Act, Sched. IV, para. 5 (2)).

60 1948 Act, ss. 44–48; 1955 Act, Sched. VI, Pts. I and III.

61 1955 Act, Sched. VI, Pt. 1.

the area of one valuation panel may be treated as being within the area of one panel.[62]

Local valuation court procedure

105. A local valuation court is to sit in public unless any party to the appeal would be prejudiced thereby, and may administer oaths and take evidence on oath.[63] The appellant, valuation officer, owner or occupier of the hereditament, rating authority and objectors to a proposal are entitled to be heard at an appeal, to examine witnesses and call witnesses.[64]

106. Apart from these statutory provisions, the procedure is governed by the Rating Appeals (Local Valuation Courts) Regulations, 1956.[65] By reg. 4 not less than fourteen days' notice of the date, time and place fixed for the hearing of an appeal is to be given to the appellant and every person who served a notice of objection in respect of the proposal. Certain public notices are also to be given. The date, time and place of hearings are also to be posted at the offices of the panel and of the rating authority, the notice to contain a note of where a list of appeals may be inspected. Where the scheme for the constitution of the panel provides for the panel area to comprise divisions, hearings are, as far as possible, to be within the division in which the hereditament in question is situated.

107. Any person entitled to appear may do so in person or by counsel, solicitor or other representative, and a rating authority may appear by their clerk or other officer appointed for the purpose or by counsel or solicitor. No member of the local panel from which the court is constituted may represent any person before that court (reg. 5).

108. At the hearing the appellant is to begin, the other parties following as the court may determine (reg. 6).[66] If a party fails to appear the court may, on being satisfied that reg. 4 has been complied with, proceed on the assumption that he does not wish to be heard (reg. 7). If any person is unable to appear, an application for a postponement should be made, but if no assurance as to this can be obtained from the clerk of the court somebody should be sent to put in an appearance to safeguard the right of appeal to the Lands Tribunal.[67]

62 Premises divided by the boundary of a local valuation panel area would be in two or more rating areas and appeals against the two or more assessments to different local valuation courts means multiplying the costs and possibly inconsistent decisions.
63 1948 Act, s. 48 (2). See para. 108 as to order of hearing.
64 1948 Act, s. 48 (3).
65 S.I. 1956, No. 632.
66 See para. 105 as to right to call and examine witnesses.
67 See para. 125.

109. Reg. 8 provides for the adjournment of a hearing.

110. No person who is, or who represents, a party to an appeal, or who is a member or employee of a body which is a party, or a person acting for such a party or who was a witness, may be present while the court is considering its decision (reg. 9). The clerk to the court is not excluded, but since he may not take part in the decision he should not automatically retire with the court, but go in when sent for to give legal advice or read over a note of the evidence, etc.

111. The decision of the majority of the court is the decision of the court. A certified copy of the decision is to be sent to every party to an appeal and every such party is to be informed of his right of appeal to the Lands Tribunal (reg. 10).[68]

112. A local valuation court is given no power to award costs and it would probably be improper for them to make payment of the costs of any other party a term of granting an adjournment.

113. The valuation officer is to cause the valuation list to be amended as directed by the court *to give effect to the contention of the appellant* so far as it appears to be well founded.[69] This would seem to mean that where the proposal is for the amendment of an assessment, the court may amend it up or down in the direction specified in the proposal, but not in the reverse way, and only within the limits of the existing assessment in one direction and the alteration proposed in the other direction.[70]

The case in the local valuation court

114. Ratepayers often appear in person in a local valuation court and to assist them to do so the proceedings normally lack the full formality of a court of law.[71] Evidence is not as a rule taken on oath and the strict rules of evidence are not usually enforced. As noted in para. 108, the appellant begins. If he appears in person the boundary between what he says as advocate in addressing the court and what he says as witness in support of his case may be somewhat blurred, but both he and any other party to the appeal are entitled to address the court, to give evidence and to call evidence. As in court, witnesses may be cross-examined and re-examined. The appellant will wind up by replying to the case adduced against him.

115. At the end of the hearing the court retires or clears the room to consider its decision.[72] As a rule it then announces its

[68] See para. 125.
[69] 1948 Act, s. 48 (4).
[70] *Re Jones' Appeal* (1951) 44 R. & I.T. 70. L.T.; *Rees* v. *Johnson* (1957) 50 R. & I.T. 641. L.T.
[71] *Cf.* paras. 125 and 132.
[72] See para. 110.

decision, the clerk subsequently sending written notice thereof to the parties, the notice indicating the right of appeal. There is no order as to costs.[73]

116. As noted in para. 74, *ante* (Article 2), where a question of value is concerned, what has to be determined is the value of the hereditament at the date of the proposal and it is to this that the evidence should be directed. Whatever the nature of the proposal it is to be remembered that the appellant is tied by the nature of his proposal and the supporting grounds specified therein.[74]

117. The case should be prepared carefully since, as observed in para, 31, note 38, *ante* (Article 1), an assessment is prima facie correct. Points to be brought out in opening are the address of the premises and the part thereof (if the proposal concerns a part), the user, the matter by which the appellant is aggrieved and the amendment proposed. Where the question is one of value, the opening and evidence may deal with the type of hereditament, its age, construction and condition,[75] size of site, the merits and demerits of the situation both as to locality and position in the building (if part of a building), any special advantages or disadvantages arising from planning or construction or means of access, in some cases the cost of the building or its cubic contents and estimated cost,[76] the terms of the tenancy (if any), comparison with rents and assessments of comparable hereditaments, including users, frontages, floor areas, details of accommodation so far as ascertainable, and relative advantages and disadvantages.[77] See also paras. 53 to 86 (Article 2) as to matters affecting different classes of hereditament and paras. 19 to 34 (Article 1) as to evidence of value.

118. To show the position of the hereditament and its surroundings a block plan to the scale of twenty-two feet to the inch (*i.e.*, a four-times enlargement of the old Ordnance Survey sheets for London) or 1/250 (a ten-times enlargement of the 1/2500

[73] See para. 112.

[74] Para. 98 and note 26.

[75] But see para. 18, *ante* (Article 1), as to state of repair.

[76] Cost would normally only be applicable where it was sought to apply the contractor's test (para. 37, *ante* (Article 2)). Estimated cost may be arrived at by multiplying the cubic contents of the buildings in cubic feet by a price per cubic foot derived from experience (this is obviously a matter for an expert witness) or by multiplying the area in square feet by a price per square foot similarly derived ("squares" of 100 square feet are sometimes used in place of square feet). Unless the question of cost is going to be dealt with in evidence and applied in some way to the assessment of annual value, objection should be made to any attempt to introduce the matter. It is one thing to say, "This is a very well built and highly finished building"; but quite another thing to say "It must have cost at least £. . . ."

[77] It has been said it is not sufficient to show some lack or disadvantage in the appeal hereditament as compared with others, but also that there is no counterbalancing extra or advantage. Presumably what was meant was that the appellant must bring all the material points of difference into consideration and not just pick out those which suit his case.

Ordnance Survey sheets for the Provinces) is useful for indicating at an adequate size points as to the immediate locality, *e.g.*, whether a building is prominent or to some extent obscured, the proximity of depreciatory neighbouring users and the position of near-by comparables. One or more Ordnance Survey sheets may be used to show the position of all the comparables and the appeal hereditament. Photographs will often convey information more vividly than a long verbal description (but they can also be so taken as to give a false impression). Floor plans to the scale of eight feet to the inch are very useful in showing the planning and extent of accommodation in a building. Spare copies of plans and photographs should be available for the use of the court and for other parties to follow the evidence. So far as possible any figures, plans, photographs and all factual evidence to be produced should be agreed in advance with the valuation officer,[78] and since he will probably be preparing plans it may save expense in a small case if these can be prepared and agreed at an early date.[79] Relevant documents should be produced and a tenant should produce a copy of his tenancy agreement [80] and copies of clauses to which particular reference is intended to be made should be prepared and agreed.

119. In preparing a case a great deal of information may be gathered. It may not be necessary to put all this into the case, but it is as well to have it available if only to correct with certainty any inaccurate statements by others or to be prepared for the line taken by other parties and to know the points on which they may cross-examine or may fear to be cross-examined.

120. If the hereditament comprises a number of parts and a detailed valuation is built up from the various floor areas or by other means, a typed copy of the details stating by whom it was prepared (preferably an expert witness) should be available for the court and other parties. Similarly, if considerable evidence of other rents or assessments is to be given, copies of schedules setting out the main details of the hereditaments, such as rents, assessments,

78 In the Lands Tribunal strict proof is required of matters not admitted or agreed: *Simons* v. *Fraquet* (1953) 46 R. & I.T. 511, L.T.; but where a valuation officer is giving evidence as to a number of similar hereditaments he need only have inspected a selection: *Plowman* v. *Gilbert* (1957) 50 R. & I.T. 489, L.T.

79 Plans are not essential, but if the case goes to the Lands Tribunal the valuation officer would be wise to prepare them: *Replacement Engine Components Ltd.* v. *Toovey* (1958) 51 R. & I.T. 797, L.T. Thoroughness in preparing for the local valuation court hearing will not only be work usefully performed if the case goes to the Lands Tribunal, but may avoid the problem, if the decision of the local valuation court is adverse, whether or not to appeal to the Lands Tribunal because the case was inadequately presented.

80 *Gray Roofing Co.* v. *Hall* (1959) 52 R. & I.T. 725, L.T. Although this was a case before the Lands Tribunal, the rule should be followed in presenting a case to the local valuation court.

floor areas, frontages and users may be handed in by the person presenting the case.[81] The information must still be given in oral evidence, the purpose of the schedules being to save laborious note-taking of details by the court and to ensure that all the data are before them in their subsequent deliberations. Only details may be dealt with in this way; in other respects the person presenting the case has to ensure that the court is convinced whilst he has the opportunity of addressing it and presenting the evidence of his witnesses.

Returns admissible as evidence

121. One source of information as to rents payable for comparable hereditaments is the returns made by occupiers and owners in response to statutory requests for information for rating purposes. Under section 3 (2) to (4) of the 1955 Act the following returns are admissible in any valuation proceedings as evidence of the facts stated therein, *viz.*, returns made under section 58 of the 1948 Act, and under certain other enactments under which the information is now likely to be of little value. Any document purporting to be such a return is to be deemed to be such unless the contrary is shown. These provisions do not apply where the net annual value is to be ascertained by reference to accounts, receipts or profits unless in the circumstances the return could be used without recourse to section 3. " Valuation proceedings " means any appeal to a local valuation court or proceedings in consequence thereof.

122. Valuation returns are held by the valuation officer and are not open generally to inspection by the public or ratepayers. If a valuation officer proposes to use any such returns in an appeal he must give fourteen days' notice thereof, specifying the returns to be used, to the person who made the proposal and any person whose notice of objection has not been unconditionally withdrawn, and he must allow these persons to inspect and take extracts from the specified returns at any reasonable time on twenty-four hours' notice.

123. Any person served by the valuation officer with notice of his intention to use any such returns may give notice to the valuation officer specifying other hereditaments (not exceeding the number selected and specified by the valuation officer in his notice) as being comparable or relevant to that person's case, requiring the valuation officer to permit him to inspect and take extracts from the returns (if any) for those hereditaments, and also requiring him

[81] See also para. 129, note 92. The schedules should contain a reasonable description of the premises extending to points of similarity and difference, but not to minor matters.

to produce at the hearing such of these returns as he may specify before the date of the hearing. If the valuation officer refuses or fails to allow the inspection of returns or to produce those requested, see reg. 12 of the Rating Appeals (Local Valuation Courts) Regulations, 1956 (No. 632).

124. Unless the ratepayer has some knowledge of the rental histories of comparable hereditaments, his selection of returns may not be the ones most to his advantage. The presumption, however, is that the valuation officer will pick those which he considers to show a true pattern of values and not just those which will most effectively bolster up his case. His attitude should be that, looking at all the relevant returns as a competent valuer, he considers those selected by him as being the most suitable for arriving at a true determination of the value of the hereditament in question. This is, of course, to some extent making him a judge of the evidence. The returns are evidence, not proof, of the facts therein and to anybody with experience of returns their reliability may be suspect.[82] A number of returns may, however, be sufficient to indicate a pattern of values. The appellant or other party need not call for the production, at the hearing, of the returns he has selected for inspection if he finds them unsuitable, but it is to his disadvantage that the valuation officer may look at as many returns as he pleases in making his selection of, perhaps, four or five, when the right of any other party will be to pick four or five blindly in the hope that they may be of some assistance to his case. If, however, the valuation officer produces no return there may be an inference that there is nothing in any of them to support his case.

Appeal to Lands Tribunal

125. Any person who appeared or was represented before a local valuation court and is aggrieved by their decision [83] may, within a period to be prescribed under section 3 of the Lands Tribunal Act, 1949,[84] appeal to the Lands Tribunal.[85] The rules governing these appeals are set out in the Lands Tribunal Rules, 1956 (No. 1734). The procedure in the Lands Tribunal is more formal than in a local valuation court and counsel is frequently briefed. In simple cases appellants do sometimes appear in person or by a surveyor, but it is

82 If a return is intended to be objected to, evidence refuting it should be called: *Inwood* v. *Langridge* (1960) 53 R. & I.T. 10.

83 As to " aggrieved " see para. 94, note 14.

84 S. 49 (1) of the 1948 Act prescribes within 21 days of the decision (which is the date on which it is given, not that on which it is confirmed in writing: para. 115). The new Bill Sched. IV, para. 6 (2), proposes to amend this as noted in the para. 125.

85 Lands Tribunal Act, 1949, s. 1 (3) (e), repealing the appeal to county court under s. 49 (4) of the 1948 Act.

difficult to separate the roles of advocate and witness, the dividing line between which cannot be blurred as in a local valuation court.[86]

126. Section 49 (1) of the 1948 Act enables the Tribunal to fix an assessment at any figure open to the local valuation court,[87] but this is restricted by rule 45 (1) of the 1956 Rules to the contentions before it,[87a] *e.g.*, if a ratepayer has proposed a reduction of his assessment from £100 to £70, the local valuation court may determine it at, say, £85.[88] On appeal by, say, the valuation officer, the Tribunal may only fix the assessment at £100 or £85 or at some intermediate figure; if the ratepayer wishes to argue for a figure less than £85 he should make his own appeal against the determination of £85 [88] and not rest on the hearing of the valuation officer's appeal.[88a]

127. It is for the appellant to show that the decision of the local valuation court is incorrect and the Tribunal is entitled to say it will not overrule the lower court unless satisfied by the appellant that the findings were wrong.[89] The Tribunal is reluctant to interfere with a decision of a local valuation court where only a few pounds are involved unless there has been a mistake of law or the application of a wrong principle of valuation.[90]

128. Although the Lands Tribunal includes experienced surveyors it is not competent for them to express their superior wisdom by substituting their own figure for one agreed between the experts for the parties; but where the ratepayer is not represented and the only expert evidence is for the rating authority, the Tribunal can fall back on its own experience.[91]

128a. The tribunal has a discretion to hear further evidence after the close of a hearing.[91a]

129. Rule 11 of the 1956 Rules provides, where the net annual value exceeds £200 or the appeal is on a point of law, for the appellant to send to the Registrar of the Tribunal a statement of case, including facts to be proved and points of law to be relied upon.

86 Para. 114.
87 Para. 113.
87a " Contention " in s. 48 (4) of the 1948 Act means the figure aimed at and not the factual arguments on which the case is based. The Tribunal may, therefore, make a finding arrived at on a different basis from those put forward by the parties, but presumably only if there is evidence on which such a finding could be based. See also *Sandown Park* v. *Castle* (1954) 47 R. & I.T. 351, 367; the tribunal is not bound by agreement of the parties to apply the profits basis but may arrive at a value not contended for by either party provided there is evidence on which it can fix such a value. Such evidence was, in fact, given incidentally in the case cited.
88 *Ellerby* v. *March* (1954) 47 R. & I.T. 335.
88a See para. 97 note 23 (iv).
89 *Sole* v. *Henning* (1959) 52 R. & I.T. 541, C.A.
90 *Payne* v. *Ireland* (1957) 50 R. & I.T. 379, L.T.
91 *Sheffield City Council* v. *Meadow Dairy Co. Ltd.* (1958) 51 R. & I.T. 233, C.A.
91a *Wexler* v. *Playle* (1960) 53 R. & I.T. 38 (C.A.).

Copies of these are sent to each of the respondents who must deliver their replies to the Registrar for transmission to the appellant. These pleadings must be accompanied by valuations, which the party proposes to put in evidence, including particulars and computations in support of each valuation and a description of the comparable hereditaments on which the party intends to rely.[92] Although copies of the pleadings are sent without delay to the other parties, copies of other documents are not sent until the Registrar has them from all parties. The valuations should be those which the witnesses will give in evidence, but they are not binding on the parties.[93] Amended valuations may be lodged in sufficient time for the other parties properly to consider them.[94] Where different bases of valuation will apply according to the interpretation of a point of law, alternative valuations should be lodged.[95] Failure of a party to comply with rule 11 may result in an adjournment at his expense,[96] but where there would be sufficient opportunity of considering a new valuation before the next day's hearing, it may be allowed to be put in without an adjournment.[97]

130. Apart from this exchange of valuations, a valuation officer is not obliged to disclose details of his valuation before the hearing.[98]

131. Where possible, facts should be agreed between the parties.[99] Plans are not essential, but the valuation officer would be wise to provide them.[1]

132. Where the ratepayer is not represented at the hearing authorities in his favour should be cited as well as those in favour of the valuation officer.[2] A party to an appeal is not tied to the substantive points and evidence given before the local valuation court.[3] See also paras. 116 and 118 and notes 77 to 79 thereto; also para. 98, note 28. As to the use of rating returns see paras. 121 to 124 and note 82.

Service of notices

133. By section 63 of the 1948 Act notices to persons other than a local authority or valuation officer are to be served as provided for

92 The list of comparable hereditaments must include a reasonable description extending to points of similarity and difference, but not to minor matters: *Marchi-Stevenson* v. *Edwards* (1958) 51 R. & I.T. 533, L.T.
93 *Sheffield City Council* v. *Meadow Dairy Co., supra.*
94 *Hutton* v. *Davies* (1960) 53 R. & I.T. 22, L.T.
95 *Birmingham City Council* v. *Bromsgrove R.D.C.* (1955) 48 R. & I.T. 511, L.T.
96 *Stolarz* v. *Wood* (1958) 51 R. & I.T. 824, L.T.
97 *Duval* v. *Woodward* (1959) 52 R. & I.T. 623, L.T.
98 *S. Thomas & Co. (Nottingham) Ltd.* v. *Emmett* (1955) 48 R. & I.T. 761, L.T.
99 *Hutton* v. *Davis, supra*; *Peche* v. *Wilkins* (1959) 52 R. & I.T. 86, C.A.
1 *Replacement Engine Components Ltd.* v. *Toovey* (1958) 51 R. & I.T. 797, L.T.
2 *Medcalf* v. *Shalders* (1958) 51 R. & I.T. 265, L.T.
3 *S. Aston & Sons* v. *Charles* (1953) 46 R. & I.T. 446, L.T. But a change of approach or evidence may affect the award of costs.

in section 59 of the 1925 Act, *i.e.*, by personal delivery of the notice; leaving it at, or forwarding it by post to, the last known place of abode (or registered office in the case of a company); leaving it with some person on the premises to which the notice relates or, if there is no person thereon, fixing it to some conspicuous part of the premises; or, where the notice relates to the business premises of the party served, leaving it at, or sending it by post to, that place. The Interpretation Act, 1889, applies to service.

134. Notices may be addressed to the " owner " or " occupier " without further description.

135. Also by section 63 of the 1948 Act applying the 1925 Act, a notice to a local authority should be addressed to the authority or the clerk thereto and served by leaving it at, or posting it to, the office of the authority. By section 63 of the 1948 Act a notice to a valuation officer of a rating area may be addressed to the " valuation officer " without further description. The address for service is to be given in any notice served by the valuation officer in respect of any matter in which there is a right of appeal.

136. The foregoing provisions apply to the service of notices under section 3 of the 1955 Act (which relates to the production of returns as described in para. 121).

Returns

137. A valuation officer may require from the occupier, owner or lessee of any hereditament in his area a return of information reasonably required to enable him to prepare a new list or to consider making or objecting to a proposal for the revision of a current list.[4]

Supplementary Notes to Articles 1 and 2

Including amendments to the Rating and Valuation Bill, further decisions in the Lands Tribunal, and other matters

Article 1

Para. 8. Chattels on the land may become rateable if they are enjoyed with the land and enhance its value: *London County Council* v. *Wilkins* [1957] A.C. 362. In *Woodward* v. *Brading & Blundell* [1951] 1 R.V.R. 261, builder's huts were held not to be plant. As to petrol tanks see Supplementary Note to para. 84. Temporary partitioning erected by a tenant is not plant and may not affect rental value: *City of Sheffield* v. *Meadow Dairy* (1958) 51 R. & I.T. 233, L.T.; *Hope* v. *Wellcome Foundation* (1960) 53 R. & I.T. 202, L.T.

[4] The power is to obtain information to consider whether a proposal or objection should be made, not information to support a proposal or objection already made, and a return secured after the event cannot be produced in evidence: *Lach* v. *Williamson* (1958) 51 R. & I.T. 92, L.T.; also article at (1958) 51 R. & I.T. 87.

For the general meaning of plant and machinery see *Yarmouth* v. *France* (1887) 19 Q.B. 647 and *J. Lyons & Co.* v. *Att.-Gen.* [1944] Ch. 281. Plant is to be distinguished from the setting in which the business is carried on: what is part of the setting is rateable, but what is plant and machinery is only rateable if included in the Plant and Machinery (Valuation for Rating) Order, 1960. See *Lyons'* case, *supra*; *Dawkins* v. *Royal Leamington Spa Borough Council and Warwickshire County Council* (1961) 1 R.V.R. 291, L.T.; *Chancery Lane Safe Deposit* v. *Steedens* (1961) 1 R.V.R. 262, L.T.

Para. 11. The proviso to the definition of "gross value" is repealed by **cl. 6 of the new Bill.**

Para. 12. The provision of s. 22 (1) (*a*) of the 1925 Act as to the deduction of drainage rates is repealed by cl. 8 of the new Bill.

Net annual values are to be taken to the nearest £ (new Bill, Sched. IV, para. 9).

Para. 13. For abolition of industrial and freight transport derating see cl. 1 of the new Bill.

Rateable values are to be taken to the nearest £ (new Bill, Sched. IV, para. 9).

Agricultural buildings include buildings used solely in connection with agricultural operations carried out on land and occupied by the occupiers of all that land or by a management committee for such occupiers, each member of which is an occupier of some of the land or a member of the board of directors or other governing body of such an occupier who is a body corporate, the number of occupiers not exceeding twenty-four.

Para. 15. For the power of the Minister to order partial derating of dwelling-houses, etc., see cl. 2 of the new Bill.

A "dwelling-house" is defined in s. 3 of the 1953 Act as a "hereditament used wholly for the purposes of a private dwelling or private dwellings." A "private dwelling" is the dwelling of a private person in his private capacity: *Morrell* v. *Glamorgan C.C.* (1958) 51 R. & I.T. 687, L.T.; *London County Council* v. *Gilmore* (1959) 52 R. & I.T. 638, L.T. A house occupied as a dwelling by members of a religious order not subject to outside control was a dwelling-house: *Perrins* v. *Bathurst* (1958) 51 R. & I.T. 638, L.T. A flat which is self-contained within its own outer door is itself a hereditament and not part of a building used as private dwellings.

S. 3 (2) of the 1953 Act provides that a hereditament in which the whole or substantially the whole of the "available accommodation" is *used* for the letting of single rooms is not to be deemed to be used wholly as a private dwelling or private dwellings. The "available accommodation" means "so much of the accommodation in the hereditament as is suitable for the letting of rooms singly for residential purposes" and "letting rooms" includes letting by way of tenancy or licence and with or without board or other services or facilities. The words "available accommodation" would, therefore, only exclude kitchens and bathrooms and rooms approached through or giving approach to another room and so not suitable for letting singly. The rooms occupied in a house by a person who lets part of the house in single rooms are not to be excluded from the "available accommodation": *Walls* v. *Peak* (1960) 53 R. & I.T. 230, C.A., in which it was held that seven rooms out of eleven was not substantially the whole. When this case was before the Lands Tribunal it was said that the seasonal letting of rooms was sufficient for the question of letting rooms singly to be raised: (1959) 52 R. & I.T. 290. Para. 13 of Sched. IV to the new Bill provides that the exclusion from the meaning of "dwelling-house" of hereditaments of which the whole or substantially the whole of the available accommodation is used for letting in single rooms does not apply where the dwellings have qualified for subsidy or grant under the Housing

(Financial Provisions) Act, 1958, including improvement grants to private owners under s. 30 of the Act. If in this respect a proposal is made for the amendment of an assessment existing on the passing of the Act, the earliest date from which the proposal can have effect will be the date of such passing (*cf.* para. 102).

A "private garage" is "a hereditament having a floor space not exceeding 240 square feet and used as a lock-up garage" other than (a) a garage forming "part of the premises in which a business of providing services for motor-vehicles is carried on," (b) a garage "provided by the keeper of a hotel, inn, guest-house or boarding-house, and used wholly or mainly for the motor-vehicles of his guests," and (c) a hereditament used as a garage for a motor-vehicle chargeable with duty under s. 3, 4 or 5 of the Vehicles (Excise) Act, 1949 (relating to hackney carriages, tractors and goods vehicles), whether or not it is used for any other vehicle.

"Private storage premises" means a "hereditament used wholly or mainly in connection with a dwelling-house or dwelling-houses and so used wholly or mainly for the storage or accommodation of any of the following articles, namely: household stores and other articles of domestic use and light vehicles (that is to say, bicycles, tricycles, perambulators and similar vehicles) whether mechanically propelled or not."

Para. 17, *sub-para.* (c), *note* 4. The ability of the actual tenant to pay the hypothetical rent may be a material consideration where he is the only possible tenant: *Tomlinson* v. *Plymouth Argyle Football Club* (1960) 53 R. & I.T. 297, C.A.

Para. 17, *sub-para.* (f), *note* 9. Local rumour may put a tenant on inquiry as to planning and other proposals, but it is necessary to differentiate between draft plans and those approved by the Minister: the question is what rent would a tenant be prepared to pay for a tenancy from year to year having regard to the knowledge available and the stage of the proposals at the time by reference to which the rent has to be determined: *King* v. *Johnston* (1957) 50 R. & I.T. 317, L.T.; *Ritchie* v. *Brewin* (1958) 51 R. & I.T. 90, L.T.; *Burley* v. *A. & W. Birch, Ltd.* (1959) 52 R. & I.T. 577, L.T. (as to having regard to the effect of a scheme on the mind of the tenant).

Para. 17, *sub-para.* (f), *note* 11. In *Allen's (Plymouth), Ltd.* v. *Blackman* (1955) 48 R. & I.T. 601, L.T., the hereditament was a repair garage which could be used for other light industrial purposes without planning permission. It was assessed in line with other light industrial hereditaments.

Para. 17, *sub-para.* (g), *note* 12 (i). In *Fir Mill, Ltd.* v. *Jones* (1960) 175 E.G. 1029, L.T., the tribunal observed that a dwelling-house is to be valued as a dwelling-house, a shop as a shop but not any particular kind of shop, and a factory as a factory but not as any particular kind of factory. This is plainly inconsistent with *Hudson & Son* v. *Rennick* unless it is to be regarded as a general statement which is broadly true in the majority of cases.

Para. 20, *note* 21. See para. 17, sub-para. (c), note 4, *supra.*

Para. 20, *note* 22. See also *Cooper* v. *Peak* (1961) 1 R.V.R. 376, L.T.

Para. 30. It is understood that the order will be made as soon as sufficient information is available and before the new valuation lists are completed.

Article 2

Para. 53. In *Tennent* v. *Jackson* (1961) 1 R.V.R. 351, L.T., the tribunal observed "it is almost invariably the case that the rents obtainable from the parts of a house divided into self-contained flats far exceed the rent obtainable for the whole and bear no ascertainable relation thereto." Where a bedroom

is converted into a bathroom there is a loss of a bedroom and the gain of a bathroom; whether or not this adds to the letting value of the house depends on whether the local demand is greater for a house with the extra bodroom than for the house with a bathroom. In two cases increases in assessment have been made: *Jackson* v. *Parsons* (1961) 1 R.V.R. 352, L.T.; *Gilbard* v. *Bowen* (1961) 179 E.G. 43, L.T. The issue is a practical one for evidence.

Para. 61. See note on *Tennent* v. *Jackson* in respect of para. 53, *supra.*

Para. 65. Cl. 6 of the new Bill provides, in effect, that the gross value of a hereditament is to include (a) any profit the landlord may make or expect to make in providing services in relation to the hereditament (this applying to any type of hereditament so that the latter part of note (h) should be deleted) and (b) the cost of repairs to and the maintenance and insurance of premises not forming part of the hereditament where such cost is incurred by the landlord in relation to the hereditament (this also applying to any type of hereditament). For this purpose "premises" includes plant and machinery which would form part of the premises if they constituted a rateable hereditament. In the *Peachey* case depreciation was a distinct claim from those for repairs and maintenance and presumably it may still be claimed. "Insurance" applies to the insurance of the "premises" as such and not, for example, to third party insurance or insurance against damages for breakdown. The repair, maintenance and insurance and depreciation of chattels such as carpets, fire extinguishers, and possibly electrical light fittings would still be permissible, these not being part of the "premises."

The proviso to the definition of "gross value" in s. 68 of the 1925 Act is repealed (see para. 11).

Cl. 6 will have effect from the passing of the new Bill, but any alteration of the list in consequence of a proposal in this respect will not have effect from any date before the passing of the Bill (*cf.* para. 102).

Para. 77. Industrial development certificates affect the availability of industrial premises and hence market value. They are part of the general conditions of the current market in which the hypothetical tenant is bidding and regard is to be had to their effect on rental value: *Lee* v. *Southward Manufacturing Co.* (1961) 1 R.V.R. 230, L.T.

Para. 81. The general rule as to the assessment of advertising stations under the Advertising Stations Act, 1889, and s. 56 of the Local Government Act, 1948, is that such a station is to be rated as a separate hereditament unless the advertising right is exercised by the occupier of the land on which the right is exercised. When the right is separately let or reserved out of a letting of the land, the "right" may be to use an existing structure for the display of advertisements or to erect a structure for that purpose. In the first case the structure would be part of the advertising station to be assessed, but in the latter case, since the instruction of the 1948 Act is that the "right" is to be rated, the added structure would not be part of the hereditament to be assessed. Cl. 9 of the new Bill provides that for the purpose of lists made after the passing of the Bill, the assessment is to include any structure available for use for the exhibition of advertisements even if provided by the occupier or after the right was let out or reserved.

Again, since the statutory instruction is that the right is to be rated, it becomes rateable in law on being granted and before the erection of a display structure or the display of advertisements. Cl. 9 provides that for the purpose of lists made after the passing of the Bill the hereditament is to be deemed to come into existence when, after the right has been let out or reserved, a structure is erected for enabling the right to be exercised or any advertisement is exhibited in pursuance of the right.

For the purposes of s. 42 of the 1948 Act .para. 102), which makes provision

as to the date from which a proposal to alter a list is to have effect, cl. 9 of the Bill provides that the coming into existence of an advertising hereditament is to be treated as a hereditament newly erected or constructed and the subsequent erection, dismantling or alteration of any structure for enabling a right to be exercised is to be treated as the making of a structural alteration to the hereditament.

Para. 84. As to the rating of petrol tanks see *Shell-Mex & B.P.* v. *Holyoak* (1959) 52 R. & I.T. 134, H.L.; *Shell-Mex & B.P.* v. *Jarvis* (1961) 1 R.V.R. 106, L.T.; *Slack* v. *Harrison* (1961) 1 R.V.R. 110, L.T.

Where a hereditament is used for composite purposes, disabilities affecting one part used for one purpose may affect the value of the whole, but a showroom with a garage is not so damaged by being well set back from the street as a separate shop might be: *Maddox & Kirby* v. *Hall* (1961) 1 R.V.R. 7, L.T. This is a matter of practical valuation and not a principle.

Para. 86. A similar "points" method was applied with approval to guesthouses in *Hutchinson* v. *Ackland* (1961) 178 E.G. 899, L.T.

SOME PROBLEMS OF MENTAL INCOMPETENCE IN THE LAW OF CONTRACT AND PROPERTY

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Except in so far as it contemplates the extinction of the status of a lunatic so found [1] the Mental Health Act, 1959, does not affect [2] the previous law governing the capacity of a person of unsound mind to bind himself by his acts in law. Although this law has not been the subject of so much controversy [3] as the rules of criminal law governing insanity nevertheless it presents a number of problems, some awaiting a solution by the courts, others appropriate for reforming legislation.

I

The most significant of these problems is the question whether the rules of common law and equity are similar in this field. Many textbooks [4] by confining themselves to a statement of the common law position as set out in the leading cases of *Imperial Loan Co.* v. *Stone* [5] and *York Glass Co.* v. *Jubb* [6] would seem to leave one to infer that equity has no more to say on the question. Others [7] explicitly commit themselves to the view that the rules of law and equity are the same and judicial support [8] can be found for this standpoint.

It will be recalled that in *Imperial Loan Co.* v. *Stone* Esher M.R. stated the common law position in the following terms [9]: "When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and

1 His deeds, and presumably his contracts, are void: *Re Walker* [1905] 1 Ch. 160. This it seems now applies to cases under Part VIII of the 1959 Act. See 73 L.Q.R. at p. 85.

2 For discussions of the effect of the Act in this regard see (1960) 23 M.L.R. 421, and upon conveyancing generally (1960) 110 L.J. 759.

3 But see 17 L.Q.R. 147; 18 L.Q.R. 21; 21 Col.L.R. 424; 11 Can.B.R. 600.

4 See Cheshire and Fifoot, *Contract* (5th ed.) p. 354; Sutton and Shannon, *Contracts* (5th ed.) pp. 116–118; Salmond and Williams, *Contracts* (2nd ed.) p. 321; Anson, *Contract* (21st ed.) pp. 198–199; Pollock, *Contracts* (13th ed.) pp. 74–77; Chitty, *Contracts* (21st ed.) pp. 578–579. But see Salmond and Winfield, *Contracts*, at p. 495, and Atiyah, *Contracts*, pp. 89–90.

5 [1892] 1 Q.B. 599.

6 (1925) 134 L.T. 36.

7 Anson, *Contract* (21st ed.) p. 199; *Fry on Specific Performance* (6th ed.) p. 127. note 3.

8 See *per* Sargant L.J. in *York Glass Co.* v. *Jubb*, *supra*, at p. 44; also *per* Lord Hardwicke in *Bennett* v. *Vade* (1742) 2 Atk. 324 at p. 327, and *per* Jekyll M.R. in *Osmond* v. *Fitzroy* (1731) 3 P.Wms. 129 at p. 130.

9 [1892] 1 Q.B. 599 at p. 601.

proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of knowing what he was about."

Lopes L.J. used similar language,[10] except that he spoke of the rule being limited to " fair " contracts, and these statements of the law were considered and applied by the Court of Appeal in *York Glass Co.* v. *Jubb*. In that case Sargant L.J. discussed the question whether, even though a contract was valid at law, nevertheless it might be so oppressive that " equity would have restrained the enforcement by the plaintiff of his legal rights." On this the learned Lord Justice said [11]: " With regard to that there is only one case which I need refer to. That is the case of *Campbell* v. *Hooper*.[12] That was a case where a mortgagee was coming to enforce against the estate of the mortgagor what was due on the mortgage security. There was the defence that the mortgagor was a lunatic at the time of the making of the mortgage, in such a case a bill would have lain to restrain an action at law; *a fortiori* the Court of Chancery would not have given effect to a bill for the foreclosure of the mortgage. I find there that the Vice-Chancellor in his judgment adopts the same tests exactly as had been adopted at law. He refers to the case of *Baxter* v. *Earl of Portsmouth* [13] and he refers to the summing up of Patteson J. in *Dane* v. *Viscountess Kirkwall*.[14] Generally he accepts the view of the law as laid down in the courts of common law. I think, therefore, in that state of things there cannot be any sustainable right on the part of the defendant by way of equitable plea seeking to have the contract rescinded and the legal remedy barred."

This seems a clear statement that there is no significant difference in the approach of equity to these problems of mental incompetence from that adopted by the common law. On turning, however, to *Campbell* v. *Hooper* it may well be doubted whether Stuart V.-C. intended to lay down any such wide proposition. A suggestion was advanced by counsel for the mortgagor that the mental deficiency of his client rendered the transaction null and void. In rejecting this proposition the Vice-Chancellor said that [15] " even at law the contract of a lunatic is not necessarily void." For this he cited *Baxter* v. *Earl of Portsmouth*, perhaps not the happiest of examples, for that was a claim in respect of necessaries,

[10] *Ibid.* at p. 603.
[11] (1925) 134 L.T. 36 at p. 44.
[12] (1855) 3 Sm. & G. 153.
[13] (1826) 5 B. & C. 170.
[14] (1838) 8 C. & P. 679.
[15] (1855) 3 Sm. & G. 153 at p. 158.

where liability appears to be quasi-contractual rather than contractual. He next proceeded to quote Patteson J. in *Dane* v. *Viscountess Kirkwall* for the propositions that at law lunacy must be known to the other party and advantage taken of it for a transaction to be invalidated.

It is perfectly possible to accept that law and equity are at one on the above two points without going so far as Sargant L.J. and suggesting that there is complete coincidence. Thus, it would seem that his statement of the law is wider than is warranted by his authority and was furthermore *obiter* because, as Warrington L.J. pointed out in his judgment,[16] the contract in *York Glass Co.* v. *Jubb* had been found to be fair and so no basis existed for the application of those equitable rules which were said to differ from the common law.

Sargant L.J. was not alone in his view as to the relationship of law and equity in this field. Thus in *Bennett* v. *Vade* [17] Lord Hardwicke said: " . . . there cannot as is truly said, be two rules of judging, in law, and in this court, upon the point of insanity."

In *Osmond* v. *Fitzroy* [18] Jekyll M.R. was quite as explicit, saying: " Where a weak man gives a bond, if there be no fraud or breach of trust in the obtaining of it, equity will not set aside the bond only for the (1) weakness of the obligor, if he be *compos mentis*; neither will this court (2) measure the size of peoples' understandings or capacities, there being no such thing as an equitable incapacity where there is a legal capacity."

In a note to this passage, however, it is pointed out by the editor of the Reports that in the unreported case of *Griffin* v. *Deveuville* [19] the Lord Chancellor observed that in almost every case on this subject (bargains with persons of weak intellect) " . . . a principal ingredient was a degree of weakness *short of legal incapacity*." Even stronger are the reported remarks of Lord Thurlow in *Gartside* v. *Isherwood* [20]: " It used to be held that a contract ought not to be set aside merely for inequality in the bargain, or merely on the ground of the weakness of the person from whom the contract has been obtained [there he referred to *Osmond* v. *Fitzroy*]. But the court has since gone further; the only principle which I can at all fix, is, that wherever it appears that fraud had been practised, there the contract, however valid at law, shall not stand in the court." Turning from these conflicting generalisations to the handling of more specific problems it seems apparent that the weight of modern authority in two major respects supports Lord

16 (1925) 134 L.T. 36 at pp. 41–42.
17 (1742) 2 Atk. 324 at p. 327.
18 (1731) 3 P.Wms. 129 at p. 130.
19 (1781) November 16.
20 (1783) 1 Bro.C.C. 558 at p. 560.

Thurlow's statement that equity adopts a much more liberal approach to problems of mental incompetence than does the common law.

In the first place unsoundness of mind, and even mere eccentricity, far less than the degree of amentia required by the common law may be relevant to the avoidance of a contract or other transactions on the ground of undue influence.[21] Secondly, even without proof of undue influence equity will set aside a transaction in which one party gained an unfair advantage by reason of the weakness of mind of the other party. Here again there is no need to prove amentia but merely some weakness producing inequality of bargaining power of which the stronger party has taken unfair advantage.

The most recent instance of the provision of this second form of relief seems to be the decision of Gavan Duffy J. in the Irish case of *Grealish* v. *Murphy* [22] where he set aside an improvident settlement made by an old man upon a much younger man who had come to live with him. The learned judge expressly found that there had been no undue influence but relying on numerous English equity authorities held that this was no obstacle to setting aside the settlement. The key passage in the judgment reads [23]: "The issue thus raised brings into play Lord Hatherley's cardinal principle (from which the exceptions are rare) that equity comes to the rescue whenever the parties to a contract have not met upon equal terms; see Lord Hatherley's judgment (dissenting on the facts) in *O'Rorke* v. *Bolingbroke* [24]; the corollary is that the court must inquire whether a grantor, shown to be unequal to protecting himself, has had the protection which was his due by reason of his infirmity, and the infirmity may take various forms. The deed here was in law a transaction for value—*Colreavy* v. *Colreavy* [25]—however tenuous the value may have proved to be in fact, and, of course, a court must be very much slower to undo a transaction for value; but the fundamental principle to justify radical interference by the court is the identical principle, whether value be shown or not, and the recorded examples run from gifts and voluntary settlements (including an abortive marriage settlement) to assignments for a money consideration."

The judgment continues with a full review of the authorities. The learned judge pointed out that the principle had been applied

21 See *Kerr on Fraud and Mistake* (7th ed.) p. 229; *Wright* v. *Proud* (1806) 13 Ves. 136; *Nottidge* v. *Prince* (1860) 2 Giff. 246; *Norton* v. *Relly* (1764) 2 Eden 286; *Lyon* v. *Home* (1868) L.R. 6 Eq. 655.

22 [1946] I.R. 35.

23 *Ibid.* at p. 49.

24 (1877) 2 App.Cas. 814.

25 [1940] I.R. 71.

to improvident grants, whether the grantor's disadvantage arose from low station and surprise as in *Evans* v. *Llewellin*,[26] or youth and inexperience as in *Prideaux* v. *Lonsdale* [27] and *Everitt* v. *Everitt*.[28] It had also been applied where inequality resulted from age and weak intellect short of total incapacity, even though there had been no fiduciary relationship and no "arts of inducement" had been used by the grantee: *Longmate* v. *Ledger*,[29] *Anderson* v. *Elsworth*.[30] "Even the exuberant or ill-considered dispositions of feckless middle-aged women have had to yield to the same principle": *Phillipson* v. *Kerry*,[31] *Wollaston* v. *Tribe*.[32]

Gavan Duffy J. went on to point out that this principle had been applied in *Everitt* v. *Everitt* [28] even though the court had found the deed to be the "most honest thing in the world" so far as the settlor and her solicitor were concerned and in *Phillipson* v. *Kerry* [31] even though the evidence of the solicitor acting for the grantor was fully accepted. Similarly in *Anderson* v. *Elsworth* [30] a deed had been set aside even though it had been prepared by the grantor's solicitor, a man of honour, but the grantor, while understanding the benefit conferred on the grantee, had not fully comprehended the effect of the deed upon her own interests. In other cases the inadequacy of an explanation given to the grantor had, said Gavan Duffy J.,[33] been "a conspicuous, indeed a decisive factor in the court's action against an improvident deed, the court either assuming, *Prideaux* v. *Lonsdale*, or having direct evidence, *Phillipson* v. *Kerry*, *Wollaston* v. *Tribe*, to prove a serious lack of understanding."

Gavan Duffy J. then referred [34] to cases where deeds had been attacked for undue influence and pointed out that in these analogous cases courts had laid stress on the need for independent advice from one who knew all the relevant facts. He mentioned in particular *Inche Noriah* v. *Shaik Allie bin Omar*,[35] *Williams* v. *Williams* [36] and the Australian case of *Watkins* v. *Coombs*.[37] Regrettably he made no mention of the question whether the party advised must not only be given advice but also act upon it or in accordance with it. In cases of mental derangement the stricter rule may well be preferable

[26] (1787) 1 Cox Eq.Cas. 333.
[27] (1863) 1 De G.J. & S. 433.
[28] (1870) 10 Eq. 405.
[29] (1860) 2 Giff. 157.
[30] (1861) 3 Giff. 154.
[31] (1863) 32 Beav. 628.
[32] (1870) 9 Eq. 44.
[33] [1946] I.R. 35 at p. 50.
[34] *Ibid.* at pp. 50–51.
[35] [1929] A.C. 127.
[36] [1937] 4 All E.R. 34. 83.
[37] (1922) 30 C.L.R. 180, 196–197.

since the very defect of intellect against the effects of which the advice is intended to protect its recipient may itself prevent him giving the advice its proper weight and consideration.[38]

In *Grealish* v. *Murphy* [39] Gavan Duffy J. treated advice given to the settlor by his own solicitor as inadequate for three reasons. First the solicitor did not know the full facts, secondly the plaintiff did not realise how deeply he was committing himself and his property in the settlement and thirdly because the solicitor treated the plaintiff as if he were mentally normal.

It will be obvious from the authorities reviewed by Gavan Duffy J. that this jurisdiction in equity to relieve against unconscionable bargains extends far beyond the limits of anything which would normally be called mental defect or derangement but equally mental defect or derangement has been the ground upon which it has been exercised in many of the reported cases. Again it is clear that a far lower standard of incomprehension or weakness than the strict common law requirement of " not knowing what he was doing " will give ground for equitable relief.[40]

It has been said [41] that a partial reconciliation can be effected by saying that so far as lunatics are concerned there is no conflict between law and equity but a divergence begins with persons whose mental weakness is less than lunacy. Such a statement, however, may obscure the point that the common-law rules, like the M'Naughten Rules, perhaps only give relief in the case of defective cognition or intelligence and make no provision for emotional or volitional derangement, where the insane person knows what he is doing but is driven to do it by some diseased impulse. Further the principal rule put forward in *Molton* v. *Camroux* [42] and *Imperial Loan Co.* v. *Stone* may be limited to the rescission of " fair " contracts, with perhaps the implicit suggestion that " unfair " contracts may be more easily set aside. If this is so, it seems to mark

[38] See *per* Farwell L.J. in *Powell* v. *Powell* [1900] 1 Ch. 243. Sheridan's *Fraud in Equity*, p. 101, citing *Re Coomber* [1911] 1 Ch. 723 and *Inche Noriah* v. *Shaik Allie bin Omar* [1929] A.C. 127 at pp. 135–136 would limit *Powell* v. *Powell* to the case of undue influence over young persons, but it may be desirable to extend Farwell L.J.'s rule to the transactions of the mentally incompetent. Nothing said in *Re Coomber* or *Inche Noriah's* case would seem to bar this.

[39] [1946] I.R. 35 at p. 46.

[40] See Sheridan's *Fraud in Equity*, pp. 73–78, and *Kerr on Fraud and Mistake* (7th ed.), pp. 177–179. It also seems that the voluntary, *i.e.*, not for valuable consideration, acts of a lunatic are invalid even against a bona fide purchaser for value: *Elliott* v. *Ince* (1857) 7 De G.M. & G. 475. See also *Buckley* v. *Irwin* [1960] N.I. 98.

[41] Sheridan's *Fraud in Equity*, p. 76.

[42] (1849) 4 Ex. 17 at p. 19. See also *per* Lopes L.J. in *Imperial Loan Co.* v. *Stone* at p. 603. For a discussion of the meaning of the word " fair " in this context see the Canadian case of *Wilson* v. *R.* [1938] 3 D.L.R. 433 at p. 447, *per* Davis J. (dissenting) and a comment in 16 Can.B.R. 727 by C.A.W.

another distinction between law and equity in this field since it would appear that the equitable jurisdiction is limited to rescinding unfair transactions. Hence the better course seems to be to recognise frankly that there is a broad divergence between equity and common law in their approach to these problems and consequently that to continue to regard *Imperial Loan Co.* v. *Stone* and *York Glass Co.* v. *Jubb* as if they contained all the law as to the liability of a person of unsound mind upon his contracts and analagous transactions for value is similar to confining oneself to a statement of the narrow old common law rules relating to coercion in contract as set out in such cases as *Atlee* v. *Backhouse* [43] and completely ignoring the important equitable gloss of undue influence.

II

Another problem in this field which awaits fuller judicial exploration is the exact relationship between the common law rules as to a lunatic's capacity as set out in *Imperial Loan Co.* v. *Stone* and the ordinary rules as to the objective appearance of consent in the formation of contracts. It will be recalled that in the *Imperial Loan Co.* case Lord Esher in the Court of Appeal said that if the lunatic was so insane that he did not know what he was doing and this was known to the other party, then the contract was not void but voidable. Of course this precise point did not arise for determination in either that case or in *York Glass Co.* v. *Jubb* since in neither case was it found that the lunatic's state of mind was known to the other party and hence the opinions on voidable contracts expressed in the Court of Appeal appear to be *obiter*. However, on an ordinary understanding of the basic rules governing formation of contract, if a question was put as to the legal effect of an apparent consent given by one sane party to another who full well knew that the other did not know what he was doing, then the almost instinctive answer of the common lawyer would be that no contract came into existence. It may then be asked, why is a lunatic to be saddled with a voidable contract in these circumstances?

This problem has come before the courts in two fairly recent cases and some suggestions towards its solution may be ventured. In England it came before Lord Goddard C.J. in *Johnson* v. *Simmonds*.[44] In that case a pushing antique dealer called on an old woman of eighty-six who was suffering from advanced senile decay and induced her to hand to him certain articles of antique china in pursuance of what he alleged was a contract of sale. After reviewing the facts the Lord Chief Justice is reported as saying: "I have

[43] (1838) 3 M. & W. 633 at p. 650.
[44] *The Times*, November 25, 1953. See a comment by the present writer in 35 Can.B.R. 205.

come to the conclusion that there never was a sale because for that to have occurred both parties must have had a contracting mind. I am satisfied that the plaintiff had no mind which would enable her to enter into a bargain with a pushing antique dealer determined to coerce her into selling her property. It was a very satisfactory morning's work for him. There was no sale at all. The defendant obtained entry to her house, took the figures which he wanted and gave her some money." Lord Goddard went on to say that if he were wrong in this he thought the case a proper one for equitable relief on the ground of undue influence but reaffirmed his preference for the view that there was " no sale."

It would seem from the emphasis placed by Lord Goddard on the words " no sale " that he regarded the transaction as void, and not as voidable, as might have been expected had *Imperial Loan Co.* v. *Stone* and *York Glass Co.* v. *Jubb* been followed in their entirety. It does not appear from the very brief report whether these cases were cited or not but the present writer has elsewhere suggested [45] that it is possible to find a place both for Lord Goddard's approach and for the view advanced in the Court of Appeal in the two cases mentioned above. This reconciliation seems to be suggested by the decision of Hallett J. in *Manches* v. *Trimborn* [46] which again was a case of imposition on an elderly woman suffering from senile decay. She signed a cheque knowing that she was so doing but also, to the knowledge of the party who invited her to sign, not appreciating the larger transaction of which the cheque formed a part. Hallett J. held that this incomprehension of the context of her act was sufficient to allow her to repudiate liability on the cheque. In the light of this decision, the suggestion was put forward [45] that a lunatic's transactions would be voidable in accordance with the dicta in *Imperial Loan Co.* v. *Stone* and *York Glass Co.* v. *Jubb* when he had some appreciation of the nature of his immediate acts but did not know or comprehend the totality of legal relations into which he was entering and this incomprehension was known to the other party. On the other hand where the insanity was so extreme as to amount to clear notice to the other party of lack of any intent to enter into legal relations then there, following *Johnson* v. *Simmonds* the transaction should be wholly void. This distinction seems consonant with others made in the case of defective transactions between normal persons. Thus when consent is partially vitiated by fraud the transaction is voidable, but on the other hand where a party is wholly deceived as to the nature of the transaction

[45] *Ibid.*
[46] (1946) 115 L.J.K.B. 365.

into which he thinks he is entering and this is known to the other party then the transaction is void as in *non est factum*.

It is suggested that this analysis can be supported by the judgment of the High Court of Australia in *Gibbons* v. *Wright*.[47] The question before the court was whether certain deeds of partition made between two elderly sisters who were joint tenants of land in Tasmania were null and void or not. Dixon C.J. delivered the judgment of the court in which many of the English authorities are subjected to full and careful scrutiny. The learned Chief Justice commenced his examination of the relevant law by saying that the judge in the court below had been right in treating this question as depending upon the possession by the two sisters of a degree of understanding relative to the nature of what they were doing. The law did not prescribe a fixed standard of sanity for all transactions.[48] " It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation." *Ball* v. *Mannin* [49] was cited as authority for this by Dixon C.J. though he admitted that the case was somewhat confusedly reported. He made the point, however, that no countenance was given to the appellant's main contention in that case that in order to avoid a deed for unsoundness of mind the defect must amount to idiocy; which it was said [50]: " implies a total absence and deprivation of the faculty of reason in the party, and is not a question of degrees, but of the nature and quality of the mind and faculty. . . . " Instead approval was given by the House of Lords to a statement that one test that could be applied was whether the person concerned was capable of understanding what he did by executing the deed, when its general purport was explained to him. Dixon C.J. mentioned *Manches* v. *Trimborn* with approval, saying that it laid down that " general purport " might mean not only the " broad operation " of an instrument signed but also the effect of a wider transaction which the instrument was a means of carrying into effect. Applying this test to the present case, the High Court thought [51] it necessary that the two Gibbons sisters should have been capable of understanding if the matter had been explained to them that " by executing the mortgages and memorandum of transfer they would be altering the character of their interests in the properties concerned, so that instead of the last survivor of the three joint tenants becoming

[47] (1953–54) 91 C.L.R. 423.
[48] *Ibid.* at p. 437.
[49] (1829) 1 Dow. & Cl. 380.
[50] *Ibid.* at pp. 386–387.
[51] 91 C.L.R. 423 at pp. 438–439.

entitled to the whole, each of them would be entitled to a one third share which would pass to her estate if she still owned it at her death."

Although the direction in the court below had not been wholly satisfactory it was possible to infer that the jury had found that the sisters did not reach this level of understanding. However, this was not enough for the appellant to succeed in the proceedings if the effect of such incomprehension was merely to render the relevant instruments voidable and not void and on this last question, so Dixon C.J. remarked, there seemed to be a singular lack of modern authority. The point had been mentioned in the High Court in *Daily Telegraph* v. *McLaughlin* [52] where it had been said that every deed executed by a lunatic was void, at least unless the lunacy was unknown to the person who procured the execution of the deed. The Chief Justice, however, pointed out that the deed in that case was a power of attorney and not one directly affecting property. Therefore what was said about deeds generally went beyond what was required for the decision and did not provide binding authority in the instant case.

Dixon C.J. then set aside [53] cases on lunatics so found and on those for whom a receiver had been appointed under the Lunacy Act, 1890, as being governed by special considerations which distinguished them from the ordinary authorities. He then passed on to an erudite examination of the common law rules, mentioning many of the leading authorities, such as *Beverley's Case*,[54] *Gore* v. *Gibson*,[55] *Molton* v. *Camroux*,[56] and *Dane* v. *Viscountess Kirkwall*,[57] and concluding this part of the judgment with a long quotation from Lopes L.J. in *Imperial Loan Co.* v. *Stone*.[58] From this it followed, so he said, that problems concerning the contracts of persons of unsound mind could not be solved by the simple formula: a contract requires the assent of both parties; a person of unsound mind is incapable of assenting; therefore no contract can come into existence between parties of whom one is of unsound mind.

Dixon C.J. then pointed out [59] that it was apparent from the passages which he cited from the judgments in *Gore* v. *Gibson* (an intoxication case) that this had not always been appreciated. He also pointed out that it had been held in the later case of *Matthews*

52 (1904) 1 C.L.R. 243.
53 91 C.L.R. 423 at pp. 439–440.
54 (1603) 4 Co.Rep. 123b.
55 (1845) 13 M. & W. 623; 9 Jur. 140.
56 (1848) 2 Ex. 487.
57 (1838) 8 C. & P. 679.
58 [1892] 1 Q.B. 599 at pp. 601–602.
59 91 C.L.R. 423 at pp. 442–443.

v. *Baxter*,[60] also a case of intoxication, that the word " void " as used in the judgments in *Gore* v. *Gibson* was to be read as meaning " voidable." He then comes to the real core of the judgment of the High Court so far as questions of common law capacity are concerned. He said that the logical flaw in the view of those who thought that the contract of a lunatic should be void was that their view [61] " erroneously assumed that a plea that the defendant was unable to understand the nature of the document sued upon is equivalent to, or involves, an allegation that he did not intend to sign it."

This he thought was not a true analysis. Such a plea of incapacity to understand does not deny, it rather concedes execution, but asserts that the state of the obligor's mind was such that if the other party was aware of it then it was tantamount to fraud of him to insist on the contract. Hence, since the plea assumed execution in the case of written contract, it was necessary to reject the analogy drawn by Griffith C.J. in *McLaughlin* v. *Daily Telegraph Newspaper* between contracts made by lunatics and situations giving rise to a plea of *non est factum*. The careful development of this point in the judgment in *Gibbons* v. *Wright* deserves full citation.[62]

" The reason for holding a contract of the latter kind void [contracts affected by *non est factum*] is that the party imposed upon did not really sign his name as a signature to any such contract as appears on the piece of paper. In that sense, ' his mind did not go with his pen ': *Carlisle & Cumberland Banking Co.* v. *Bragg*,[63] *Foster* v. *McKinnon*.[64] ' The deed is not his deed at all because he was neither minded nor intended to sign a document of that character or class ': *National Provincial Bank* v. *Jackson*.[65] No doubt it would be correct to apply the same reasoning to a case in which a lunatic wrote his name on a paper which in fact contained a contract, but did so in a frenzy, not even being aware what were the motions his hand was performing. That would be a simple case of *non est factum* for the truth would be that the signature was not a signature to that document; it would be the kind of case which Alderson B. suggested in *Gore* v. *Gibson* when he spoke of a somnambulist writing his name in his sleep. But if the case made is only a case of incapacity to understand the nature of that to which admittedly the signature was affixed no analogy exists with

60 (1873) L.R. 8 Ex. 132.
61 91 C.L.R. 423 at pp. 442–443.
62 *Ibid.* at p. 443.
63 [1911] 1 K.B. 489 at p. 496.
64 (1869) L.R. 4 C.P.D. 704 at p. 711.
65 (1886) 33 Ch.D. 1 at p. 10.

cases in which a seeming contract is held to be completely void for want of intention that the signature shall apply to any contract of such a kind."

From this passage it is clear that Dixon C.J. has in mind two groups of cases: first, one which includes *non est factum*, the somnambulist and the frenzied lunatic, where it is clearly apparent that the party had no intention whatsoever either to enter legal relations at all or else no intention to enter legal relations in the terms of the document placed before him. Here the transaction is void and *Johnson* v. *Simmonds* would seem to be an illustration of the application of the principles underlying this group of instances to an alleged contract said to have been made by word of mouth.

Against this first group of cases must be set those in which the person of defective intellect knows that he is making a signature (or giving a signification of assent orally) which he realises will affect his legal position in some way, but how and to what extent he does not understand. This situation which is clearly analogous to that in *Manches* v. *Trimborn*, in that there is some limited intent to affect legal relations, was thought by the Chief Justice to be the proper field for the operation of the rule in *Molton* v. *Camroux*, *Imperial Loan Co.* v. *Stone* and *York Glass Co.* v. *Jubb* and this marshalling of the authorities seems to coincide with the distinctions earlier suggested [66] to safeguard the authority of *Johnson* v. *Simmonds*.

A purist might perhaps quarrel with Dixon C.J.'s language when he seems to suggest that the first group of cases can be described as situations where " the party . . . did not really sign " and the second as situations where " admittedly the signature was affixed." So far as physical action is concerned there is no distinction between the cases but it is clear from his expansion of the former phrase that the distinction lies in the intention of the signing party. In the first group there is either no intention to do any act in law or such intention is vitiated by the sort of mistake which brings *non est factum* into play whereas in the second group there is an intent to perform an act in law or to sign a document of the class of that which is put forward for signature but by reason of mental defect there is no possibility of the party understanding the ulterior effects of what he has done. The word " possibility " is advisedly inserted to exclude the person of normal intellect who either carelessly signs without reading or voices an oral assent without properly applying his mind to the matter. He, of course, is fully bound.[67] It may be

[66] See *supra* footnotes 44–46.

[67] He may not be bound if he is mistaken as to the class of the document and this is known to the party tendering it to him. Wilson's *Contract*, p. 115, following Merriman P. in *Gillman* v. *Gillman* (1946) 174 L.T. 272 thinks mere mistake is not enough but that there must in addition be fraud, duress

recalled that this requirement that there should be a *possibility* of understanding seems to have been expressly sanctioned by Dixon C.J. in *Gibbons* v. *Wright* when he said [68]: " In the present case, it was necessary, we think, that the two sisters should have been capable of understanding, if the matter had been explained to them . . . " the ultimate effects of the documents they signed upon their interests in the land.

Having reached the conclusion that, except in true *non est factum* situations and in the frenzy and somnambulist cases, the contract of a lunatic was voidable and not void, he went on to consider whether any different rule applied to conveyances. He thought not [69]: " If the objection to a conveyance is that the conveyor was incapable of understanding what he was doing by executing it, there is no ground for denying that it was in truth signed sealed and delivered by the conveyor as his deed. If it be said that the mind of the conveyor did not go with his acts, the answer applies with no less force than it does in the case of a contract that that is not what is established by proof of mere absence of capacity to understand the nature of the document."

The learned Chief Justice refused to consider the question whether to avoid the deed, knowledge of the incapacity on the part of the other party must be shown or whether other evidence of unfairness would be enough. Having determined the logical solution to the problem he next passed on to consider whether any of the authorities stood in the way of its adoption.

Of the authorities which might at first sight seem to be opposed to his view of the law Dixon C.J. first discussed the power of attorney cases, in particular *Daily Telegraph* v. *McLaughlin* and the American case of *Dexter* v. *Hall*.[70] These cases, however, he considered to be merely special applications of the rule that a lunatic cannot appoint an agent [71] and did not lay down any principles for deeds generally for, as he said, in order to reach the conclusion that the instrument was void [72] " there was no necessity to consider whether the power of attorney is the lunatic's deed, for

or the like for *non est factum* to operate. On the other hand Cross. commenting on *Gillman* v. *Gillman* in 9 M.L.R. 304, and Anson, *Contract* (21st ed.) 142, following *Foster* v. *McKinnon*, consider that mistake alone is enough. It seems that Cross would not classify the frenzy and somnambulist cases as *non est factum* because there would be no positive belief that the document signed belonged to a different class but doubtless this would be no bar to such documents being held void on general principles of contractual assent.

68 91 C.L.R. 423 at p. 438.

69 *Ibid.* at p. 444.

70 (1873) 15 Wall. 9.

71 For a discussion of recent developments in regard to this rule see a comment by the present writer in 37 Can.B.R. 497.

72 91 C.L.R. 423 at p. 445.

whether it is or not it cannot have any operation to create the relationship of principal and agent." It thus followed that the reasons for holding powers of attorney void were in no way related to the principles upon which the courts acted in *non est factum* cases.

The Chief Justice also suggested a probable practical explanation for the special rule in the case of powers of attorney, saying [73]:

" The conception of a power of attorney voidable by reason of lack of understanding in the grantor would not be without its difficulty; it would mean that authority to bind the grantor would be retrospectively defeasible, with the result that acts done in exercise of the authority would be rendered void, not upon proof of such circumstances, amounting to the perpetration of a fraud by the other party to the act, as the grantor would have had to establish if he had done the act himself, but upon proof of circumstances constituting a fraud by the donee of the power, whose guilt might not be accompanied by any unfairness at all on the part of the other party. But whether or not this consideration has been at the back of it, the fact is that from early times, the power of attorney of a lunatic has been regarded as void."

It may perhaps be remarked with respect that if this was indeed the consideration in the minds of the judges when they decided the power of attorney cases they display a certain lack of logic for the essence of the explanation put forward by Dixon C.J. seems to be that since it was very unlikely that the third party had practised any direct fraud on the lunatic such third party was to be deprived of even the benefit of a voidable contract which he would have enjoyed had he dealt directly with the lunatic in circumstances of fraud and oppression. Perhaps the real explanation may have been that the courts felt that it was undesirable that a person of unsound mind should have any capacity to appoint persons to positions where by an abuse of their fiduciary duties they might work his utter ruin.

Another case which Dixon C.J. found to require explanation [74] was the old authority of *Thompson* v. *Leach* [75] where a surrender of a particular estate by a lunatic had been held to be void. He made two suggestions here. He pointed out that though in Shower's report of the proceedings in the House of Lords there was a full statement of the argument there was no report of reasons for the decision. Dixon C.J. suggested that the House had acceded to the final submission made in argument that " the word *amens* or *demens* imply that the Man has no Mind, and consequently could

[73] *Ibid.* at pp. 444–445.
[74] *Ibid.* at p. 446.
[75] (1698) Show.P.C. 150; 3 Mod. 301.

make no conveyance." The Chief Justice's comment on this was " If so, the case would seem to have been treated as one of complete dementia in which it was impossible that there should have been any real execution of the deed, rather than as one in which the deed was duly executed but by a person incapable of understanding its effect."

This, of course, would be to rank the case with *Johnson* v. *Simmonds* and the case of the somnambulist put by Alderson B. in *Gore* v. *Gibson*. Passing from the House of Lords Dixon C.J. then mentioned the numerous (and varying) reports of *Thompson* v. *Leach* before the King's Bench. Of the reports he expressed a preference for the *Modern Reports*. There the grants of a person *non compos mentis* were equated with those of an infant and both were said to be void. The Chief Justice, however, was careful to point out [76] that the proposition that an infant's surrender was void was erroneous. *Thompson* v. *Leach* in the King's Bench had thus proceeded on a " misconception of the law in relation to deeds executed by infants " and was therefore in effect *per incuriam*. He then showed that later cases which were said to have approved *Thompson* v. *Leach* could be explained on narrow grounds. Thus in *Yates* v. *Boen*,[77] as Parke B. pointed out in *Gore* v. *Gibson*, *Thompson* v. *Leach* had merely been cited for the proposition that, despite the general rule against a party giving evidence of his own insanity, such evidence could nevertheless be tendered in support of a plea of *non est factum* and in *Ball* v. *Mannin* the House of Lords had not considered the distinction between void and voidable deeds. The House of Lords had been confined by a bill of exceptions to certain limited objections to the trial judges' direction to the jury as to what constituted " such unsoundness of mind as should avoid a deed at law."

There remained two other cases which had been referred to by Griffith C.J. in *McLaughlin* v. *Daily Telegraph* and which appeared to run contrary to the view taken by the court in *Gibbons* v. *Wright*. The first of these was *Jenkins* v. *Morris* [78] where, Griffith C.J. said, the validity or invalidity of the deed was held to depend upon the lunatic's state of mind and no question of knowledge or want of knowledge on the part of the other party had been raised. Dixon C.J. adopted [79] the distinction taken by Fry L.J. in the course of the argument in *Imperial Loan Co.* v. *Stone* as reported in the *Law Journal*,[80] namely that it by no means followed

[76] 91 C.L.R. 423 at p. 447.
[77] (1738) 2 Str. 1104.
[78] (1880) 14 Ch.D. 674.
[79] 91 C.L.R. 423 at pp. 448–449.
[80] (1892) 61 L.J.Q.B. at p. 450.

from the fact that the only issue which had been directed to be tried in *Jenkins* v. *Morris* was whether the person concerned was of sound mind or not that the finding of the jury upon that issue determined the whole matter. The Court of Chancery may have withheld further matter for its own decision.

The other case which had been relied upon in *McLaughlin* v. *Daily Telegraph* and which remained to be distinguished in *Gibbons* v. *Wright* was *Howard* v. *Digby*.[81] Dixon C.J. pointed out that the two passages from the judgment of Lord Brougham in that case which had been cited in *McLaughlin* were not directed to the question of the distinction between void and voidable instruments but to liability for necessaries. " The point the Lord Chancellor was making was simply that, although a lunatic, as he thought, was incapable of binding himself consensually (and presumably he meant binding himself conclusively), yet he (and his representative) could become liable for money or money's worth received."

This said Dixon C.J. was the rule later exemplified in the Court of Appeal in *Re Rhodes* [82] and which had been applied prior to *Howard* v. *Digby* in the Court of King's Bench in *Baxter* v. *Earl of Portsmouth*.[83] Such an obligation was one " implied by law," by which the Chief Justice presumably meant that it arose quasi-contractually and not contractually, " to which lunacy affords no answer, to pay for those necessaries. . . . "

The conclusion of this exhaustive survey of the authorities by the High Court runs as follows [84]: " Upon the authorities as they now stand, it appears to us that we ought to regard it as settled law that an instrument of conveyance executed by a person incapable of understanding its effect in the sense of its general purport, is not on that account void, though in the circumstances it may be voidable by the conveyor or his representatives."

III

From the authorities here reviewed it is suggested that the following propositions may be drawn as to the present state of the law.

(a) That there is a substantial difference between the approach of equity and of the common law to problems of mental incompetence, equity being much readier to declare the transactions of a person of unsound mind voidable than is the common law. Hence it follows that authorities and textbooks which suggest that the two jurisdictions apply similar rules are misleading and it is equally

[81] (1834) 2 Cl. & F. 634.
[82] (1890) 44 Ch.D. 94.
[83] (1826) 5 B. & C. 170.
[84] 91 C.L.R. 423 at p. 449.

misleading to cite *Imperial Loan Co.* v. *Stone* and other common law authorities as if they contained all the relevant rules on this matter.

(b) Although in general a lunatic's contracts and other transactions are voidable not void, yet there are exceptions to this rule which are referred to in *Gibbons* v. *Wright*. These include the purported appointment of an agent or attorney, the case of the somnambulist and the insane person signing a document in a frenzy. When such a transaction is void at law it would seem to follow from the analogy of mistake cases that a court cannot impose terms in virtue of its equitable jurisdiction.[85]

IV

A final question which remains for brief consideration is whether the present rules attain all that moral justice might suggest and differently framed rules of law might achieve in this field. As in related problems of mistake and fraud it may well be thought that the present distinctions taken by the law between void and voidable transactions are not the most happy tools for the achievement of justice. If the transaction is void then an innocent third-party purchaser of goods or other property handed over in pursuance of the transaction bears the whole loss. If the transaction is voidable then the position of the innocent third-party purchaser is secured but it may be thought that the interests of the person of unsound mind received inadequate protection. In the field of mistake it has recently been suggested by Devlin L.J.[86] that problems raised by the question of which of the two innocent victims of fraud should bear the loss can best be met by a statutory system of apportionment. It is not appropriate to suggest here a detailed scheme but if and when such a scheme is introduced in the field of mistake it would seem desirable that some consideration should be given to including problems arising from mental incompetence within its scope.

[85] See *per* Pearce L.J. in *Ingram* v. *Little* [1960] 3 W.L.R. 504 at p. 521. But see Stuart V.-C. in *Campbell* v. *Hooper* (1855) 3 Sm. & G. 153 at p. 158.
[86] [1960] 3 W.L.R. 504 at p. 531.

THE PRACTITIONERS' INQUISITION

(*or: Are Preliminary Inquiries on the Usual Form Satisfactory?*)

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The object of this article is to criticise, from the viewpoint of practitioners, the standard form of preliminary inquiries published by the Solicitors' Law Stationery Society, Ltd. (Conv. 29) and used in routine conveyancing before exchange of contracts throughout, at any rate, the South of England.

It should be said at the outset that from the point of view of the purchaser's solicitor (who sends it) the form has many advantages. It is comprehensive in that it guarantees that if he puts a few ticks on the form he is sure to have asked all the questions on legal matters which do not arise directly out of the draft contract; the accuracy of its law is unquestioned; and the questions are framed so as to exclude nothing—designed no doubt to catch evasions. Much of the trouble arises from these very merits: because of its attempted comprehensiveness many of the questions are, in the ordinary case, unnecessary; because of its legal accuracy many of the questions are incomprehensible to those who will answer them; because of the wide terms in which questions are drawn evasion is invited instead of avoided. Moreover, apart from any particular merit of the form, some questions are improper in that a true answer demands the forming of an opinion on matters of mixed law and fact which should be the function of the purchaser's solicitor, not that of the vendor; also in spite of the attempt to be comprehensive there are some items of importance on which no questions are asked at all.

Dealing first with unnecessary questions, it must be undisputed that if one hopes to obtain helpful answers one should—the nature of solicitors and their clerks being human after all—ask as few questions as are consistent with protection of one's client. Yet many questions on the standard form do not arise in the first place but only as the result of information obtained by what one may call primary questions. Others never arise at all if the purchaser's solicitor will only think for a moment.

An instance of the former is the subsidiary planning questions which do not apply to fully developed land but are rarely deleted in accordance with the pious note at the top of the form. As to the latter, how many times has the question dealing with the water supply (6 (d)) been asked in respect of fully developed property in a city centre where the answer is obviously that there is a main supply? The purchaser must be assumed to have inspected the property and to have carried out the usual searches. A large number of the questions need not be raised at all as a matter of routine and should not be so raised until the purchaser has some particular reason to do so. The routine answer to many questions is " please search " and a question which will be so answered achieves nothing.

Then incomprehensible questions: the questions are to be answered by people who are too busy to look up the law for the benefit of someone else's client and who are in a majority of cases unadmitted clerks—people who cannot reasonably be expected to have a detailed knowledge of pure law as opposed to practical law. More than that, part at least of the answer to most of the questions is a matter of fact about the property, which is unknown to the solicitor or his clerk but is known to the client. It is therefore of great importance that in such a form those questions which depend on the client for an answer should be comprehensible to him, so that they can be put before him without explanation. Also, if purely legal questions must be raised they should be comprehensible to the ordinary solicitor or his clerk; comprehensible on sight, not after referring to a book to find out (or to check) exactly what tenancies are protected under " The Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, the Housing Repairs and Rents Act, 1954, the Landlord and Tenant Act, 1954, or the Rent Act, 1957."

In fact the wretched practitioner is confronted with four closely typed pages of questions on every conceivable topic and framed in such terms as to be totally unintelligible to his client and probably partially unintelligible to him. The vendor's solicitor may have the knowledge of the law to understand the questions but will not have the knowledge of the property to enable him to answer them: the client knows the property but does not fully understand the law. For instance, question No. 10 reads " Are there any grants or contracts (oral or written) or any rights acquired or being acquired by prescription or under any statute in respect of (a) the means of access to the property, (b) the enjoyment of the access of light or air to buildings on the property, (c) the enjoyment of the like access

over the property to buildings on any other property, (d) any wires, cables, pipes, drains or sewers (other than those solely serving the property) laid under, across or over the property? " A vendor's solicitor who wished to obtain full instructions on this question would need to explain to his client in full, *inter alia*, the law of prescription (as to rights of light and otherwise) and the possible effect of every statute in the book, general and local, public and private, which might affect the matters mentioned. When it is appreciated that all this is required to answer one question of average length out of eighteen, it will be understood why the authors think the present form is unrealistic. The only person who could attempt to give a full answer to all the questions would be a member of the legal profession skilled in conveyancing who was himself fully cognisant with all the details of the property over many years.

Apart from this difficulty, the practitioner is sorely tried by the fact that the questions are drawn like pleadings in a Chancery case, presumably on the footing that the vendor will do his best to evade the point and will answer only, literally, what he is asked, instead of replying like a sensible man to the sense of the inquiry. The writers have (when explaining the form to one of their own clients who would not understand anything more elaborate) reduced the whole form to six simple questions and only gone into detail if the answers given were not wholly clear and satisfactory. There is an element of inaccuracy in the six questions and it is not suggested that the form should be as short: but it should be possible to make it much shorter and more easily understood than it is at present.

The answers to these questions which are too widely drawn are better known to the profession than the questions themselves: " This is too wide to admit of adequate answer," " Please search," " The Vendor is not aware of any save as already disclosed or apparent on inspection " and so on. The fact that such replies are given is sufficient criticism in itself of the questions.

Lastly, we think the form of some questions puts an unfair burden on the vendor's solicitor if he tries to answer them conscientiously.

The vendor (or his solicitor) can, in our submission, reasonably be expected to answer questions of fact within his knowledge, but that is all. He cannot be expected to consider the application of the law to the facts, or to form an opinion on questions of mixed fact and law. This is for the purchaser (or his solicitor) to do if he wants it done.

We deal with questions which we feel have been left out when we come to suggest our alternative form.

When the problems confronting the vendor's solicitor are thus set out it is perhaps understandable that he reacts by being less helpful than he might. A large percentage of answers must be as totally uninformative as some of the instances already given " Inspection will reveal," " The Vendor knows of nothing not already disclosed or apparent on inspection," " This question is too wide for adequate answer " and so on. Thus the whole purpose of the inquiries, which is to obtain information, is thwarted and the operation turned into a dreary sort of game in which the purchaser's solicitor apparently tries to catch the vendor who responds by being as unhelpful as he can. The result is a loss of the client's time and the practitioner's temper with (in most cases) little practical result. The draftsman of the form appears to have concentrated on a much less important object than giving useful information, namely obtaining answers which if wrong amount to a misrepresentation giving a right to rescission if discovered before completion or an action for fraud (if appropriate). He has, however, probably failed in this object too because the questions in their present form rarely get a full answer.

It is therefore suggested that the form of questions could be greatly improved by deleting questions which are not necessary in every case or printing them in a separate section where they would have to be asked specifically, and by framing all questions so that they relate solely to fact. This would give the vendor or his solicitor a smaller number of questions and therefore a better chance in the limited time available to answer them properly.

It is now proposed to go through the form illustrating our points by criticising the questions.

Detailed criticism

Question 1 asks if the deeds, etc., are in the possession of the vendor. The question is basically sound, but it would be more convenient if the question asked where the deeds were rather than whether they were in the possession of the vendor. This is particularly important under the National Conditions of Sale, because there is then no obligation on the vendor to produce the deeds at all, and the purchaser will want to know whether they can be produced before exchanging contracts.

Question 2 (dealing with the ownership of the boundaries) is a clear and sensible question (although sometimes unnecessary).

3 (A) (breaches of covenant) is a good example of a question

which is drawn in too wide a manner and therefore defeats its own object. Of course, it is a matter of concern to a purchaser to know whether all covenants, agreements and conditions have been observed, but the vendor himself, if the question is put before him, will have only the vaguest idea of what covenants, etc., affect him and possibly an even vaguer idea of what constitutes a breach of them. For example, if a property is leasehold, what vendor will think of his repairing obligations and the fact that at any given moment he is almost sure to be to some extent in breach of them? Perhaps that is not important. But suppose the property is subject to a restrictive covenant against business user and has nevertheless been so used for many years past, what vendor will think of that? If the vendor's solicitor answers the question without reference to his client, he, understanding the import of the question but not knowing the facts, will either be bold and say " No " or more likely be canny and say " No complaint has been received by the vendor."

Unless the purchaser is prepared after inspection of the property to make specific inquiry about the particular restrictions which affect him, that is the best he is likely to get, so he would do well to ask in the first place " Has any complaint been made to the vendor of any breach . . . etc." The vendor can understand that and answer for himself.

We cannot understand the necessity for Question 3 (B), which inquires whether there are any covenants, etc., not already disclosed, unless it is directed to trap a would-be fraudulent vendor. As a matter of conveyancing practice, such covenants are always disclosed and therefore it would seem the only point of the question must be to remind the vendor's solicitor in case he has forgotten to do so. However, he is unlikely to remember merely through answering a printed routine question and this question could, and should, be omitted.

Question 4 (land tax) is unnecessarily complicated and difficult. Presumably the question was phrased some ten years ago when the Finance Act, 1949, was a matter of recent history but now references to that Act and the Land Tax Year 1948–49 merely raise unnecessary difficulties. The purchaser really wants to know two things only—first, whether land tax is payable and he can obtain this information quite simply by asking whether it has been demanded in the current financial year (if he does not think that safe, he will in any case want to ask the Inspector of Taxes himself). If it is payable, he then wants to know whether he will be required to redeem it, which is a matter for him to consider in the light of his solicitor's advice. If the vendor does not pay the tax, all he can

reasonably be asked is whether he has specific evidence (such as a certificate of redemption) that it has been redeemed. However, we feel that the whole treatment of the very important question of outgoings is clumsy in the printed form and we shall return to this when dealing with outgoings in general.

Question No. 5 (planning) probably wastes more time and causes more high blood pressure than any other. This is partly the fault of our legislators for changing the law on this topic so often. Nevertheless, although the law is now as chaotic as the questions would lead the layman to expect, in the ordinary routine case the planning matters which the purchaser wishes to know about are fairly simple. They are (a) what is the present use of the property, (b) whether any change of user has occurred in the last four years, (c) whether any building or similar operations have been carried out in the last four years, (d) whether any new access has been made to the highway in the last four years. It will be noted that references to " development (as defined in the Town and Country Planning Act, 1947) " have been omitted. The vendor himself will not know what this means and when he asks his solicitor he will be told that it means any change of user or building or similar operations and so on. As the question will be answered on this basis, however it is phrased, it might just as well be asked on the same basis.

There is no necessity to ask whether application to develop has been made because this will be revealed by the local authority searches and inquiries. Matters dealing with development charge, claims under Part VI of the Town and Country Planning Act, 1947, and with compensation under the 1954 Act are required only if the property is not fully developed, which is a small minority of cases. If these questions are included at all (and it is not unreasonable to assume that a solicitor acting for developers will be able to frame his own questions) they should be put in an optional section which would be asked only in relevant cases. The same criticism applies to the highly complex question 5 (J) which is only of interest in cases where since the coming into force of the Town and Country Planning Act, 1959, property has been compulsorily acquired by a local authority who have since sold it! This question again qualifies for the optional section, if it qualifies at all, but the authors are tempted to think that it could safely be left out in every case. In cases in which it might apply it is almost certain that the purchaser or his solicitor would have found out some facts by another route which would have put them on guard. If it is felt that the question must be asked all that is required in the first instance is

" Has the property been acquired compulsorily during the last five years? "—even if the question is still unnecessary at least it is not then an undue trouble to answer.

The question whether the vendor has received a notice of an application for planning permission is, for once, too narrow; we comment on this when we come to deal with questions which should be asked but which are omitted.

Question 5 (L) is probably the most academic and improper question in the form. It is academic because it is unlikely that any vendor will sell a property in respect of which he has already served a purchase notice on the local authority without telling the purchaser what he is doing and without the purchaser finding out either from the state of the property or from the local authority. It is improper because the question asks among other things whether the vendor is entitled to serve a purchase notice. In order to give a full answer to this question it is necessary for the vendor first to consider the law to discover the legal situation in which a vendor is entitled to serve such a notice. He then has to consider the facts to consider whether they come within the legal situation. Finally he has to make up his mind, as a matter of opinion, whether he can serve such a notice. The answer to the question can only finally be resolved by following the appropriate procedure through to the end (including, if necessary, a reference to the Lands Tribunal) and it is not really possible to answer that point of the question at all.

Question 6 deals with a number of very important matters but in a somewhat confused manner. Question 6 (A) is another example of an unnecessary and complicated question which would have to be explained by the solicitor to the client. In fact the most probable way for him to explain it is by saying that the question relates to rights of third parties over the land; so it would probably be simpler to ask the question in that way. In most cases it would be quite satisfactory merely to ask whether any rights have been claimed or exercised by third parties over the land, although it might be as well to add a reference to pipes, cables, etc., running over or under the land and serving adjoining property, so that there is no misunderstanding.

The next sub-question deals with outgoings and is a very good basis for a comprehensive question as to outgoings which should start by asking for details of all outgoings (including land tax and tithe redemption annuity). The question could then go on to deal with land tax (if disclosed) in the manner suggested above, and finish by asking for the address of the local inspector of taxes and

the reference number and confirmation that the usual authority under section 101 of the Income Tax Act, 1952, will be forthcoming.

The question as to notices which have been served on or by the vendor is of admirable simplicity and of considerable importance. Our only comment is that it obviates the necessity for some of the lengthier and more abstruse questions in other parts of the form. And tucked away modestly in this obscure corner it very seldom gets an adequate answer!

Questions dealing with water supply and drainage should once more be placed in the optional section only to be asked in respect of country properties or properties without a frontage on a main road, where the answer is not obvious.

The condemnation of Question 7 is that even in its improved form it is never answered in a helpful way and there is therefore no point in asking it. The occasions on which the authors have seen an answer other than " This question is too wide for adequate answer " to Question 7 (A) can be counted on the fingers of one hand and indeed the formidable list of statutes under which there would be liability mentioned in the explanatory " Guide to Inquiries Before Contract " would be more than sufficient to put off even the most conscientious Solicitor from attempting to answer the question. In a similar way questions (B) and (C) (dealing with compulsory purchase orders and controls by the local authority) almost always provoke the reply " Please search." We emphasise again that it is a waste of time to ask questions which it is known will not be answered in a way which gives any information.

Question 8, dealing with charges in respect of roads, footpaths or sewers is also unnecessary, because the information sought is obtained from the Local Authority by means of Searches. Once more the routine answer is " Please search."

Question 9 (A) (liability for repair or maintenance of things used in common with adjoining properties), although seemingly very practical, on reflection appears unnecessary. It seems that it can relate only to party walls, etc., in which case it has been dealt with by Question 2, or to shared services (if information is required about this, it should be requested), or to matters such as liability to repair private roads imposed by deed which will be disclosed in the draft contract, as such liability can pass only by express indemnity. If the purchaser's solicitor finds that there is a right of way, he will in any event warn his client that it may be necessary for him to repair the surface in order to be able to exercise his right.

Question 9 (B) (dealing with the ownership of fixtures, fittings, etc.) can be criticised only because it is drawn so widely that it is

virtually certain to receive a constricted and therefore largely useless reply. The purchaser wants to know two things: first, whether any fixtures which he saw at the time of his inspection will be taken away (this most important point is not dealt with at all in the standard form of inquiry) and, second, whether any fixtures or chattels which are being sold with the property are subject to hire or hire-purchase agreements. All that is required are two simple questions directed to these points.

Question 10 has already been criticised above, but it is also fair to say that it is largely a repetition of Question 6 (A); in so far as it relates to rights established by documents, they will already have been disclosed with the draft contract; and in so far as it relates to rights being established by prescription, the only possible answer is " Inspect."

This deals with the main part of the Form. The remainder of our remarks are addressed to those parts which are optional and require to be specially ticked so as to get an answer.

Dealing first with Part II (registered land), copies of all incumbrances on the register of the title being sold will be supplied as a matter of routine with the draft contract and there is no necessity for a printed form of request for these. It is unlikely that a leaseholder whose title is registered will be able to produce copies of entries on the register of any superior title which may affect the purchaser.

11 (B) (overriding interests) almost always provokes the answer " Please inspect." In general terms overriding interests are matters apparent on inspection and this is no doubt why they are " overriding interests." In practice this question is unanswerable, because the vendor's solicitor cannot answer it without inspecting the property, which is in most cases impracticable. He therefore has to rely on the client who will naturally ask what overriding interests are. The answer (as set out in the explanatory " Guide ") is that they " will be found listed in section 70 of the Land Registration Act, 1925, as extended by section 2 of the Leasehold Property (Temporary Provisions) Act, 1951 (which was itself extended by the Leasehold Property Act and Long Leases (Scotland) Act Extension Act), 1953." !

Part III of the form according to its heading concerns " Rent Acts and other Tenancy Legislation." It attempts to cover a considerable number of different sets of statutory provisions. It is therefore confusing. It is confusing to consider which questions one wants to ask and it is confusing to try to think of the answers to some which may be asked inadvertently or carelessly. It would be

better if the section were further broken down so that each part referred only to one particular type of legislation and if the section as a whole were prefaced by one single question which in many cases would be all that was necessary and would be asked only when it was known or suspected that there was some tenancy, that question being " Are the tenancy agreements written or oral? If the former, please supply copies; if the latter, please supply full particulars." That could be followed by a section dealing with the Rent Acts and that followed by a section dealing with the other great class of protection for residential property, Part I of the Landlord and Tenant Act, 1954; and that in turn followed by a section dealing with the protection of business tenancies under Part II of the same Act.

Question 13 (A) of the existing form asks about all three different classes of control in one sub-question. It is worthy of consideration whether one should not have merely points to aid the memory of the purchaser's solicitor rather than specific questions, because in dealing with what by its nature must be something other than an absolutely normal property it is very difficult to frame a standard question which will adequately cover the circumstances to be met with, without either being difficult to understand or asking for information which is not necessary in the particular circumstances.

We do not propose to criticise in detail every question under this part but another example of the faults which we have particularly in mind is question 13 (c) which asks " Whether any tenancy created since July 5, 1957, has been granted to a person who, immediately before the grant, was not the tenant under a controlled tenancy." We think that the questioner really wants to ask " When was the present tenancy created? Was the previous tenancy in favour of the same person? "

Part IV dealing with leasehold property is basically sound but has not been drafted, we feel, with an eye to the practical aspect underlying the points involved in the questions. Question 14 (a) is an admirable question because it is a regrettable fact that, although it is of the utmost importance to the purchaser to know whether he is buying a head lease or a derivative lease, there are many documents which begin " This Lease " but which in fact are underleases or even sub-underleases. Similarly the practical point of Question 15 is (if one thinks it necessary to ask this at all) " Please confirm that the vendor will obtain the landlord's licence to assign; what references for this purpose do you require from the purchaser? " (Many Conditions of Sale provide that the vendor shall obtain the

landlord's licence to assign and that if he fails to do so the purchaser may rescind.)

We do not feel competent to criticise Part V applying to Agricultural Holdings in detail, but we would make the same general criticism as we have of Part III of the Form and would add only that, being unversed in agricultural property, it would be of more help to us when acting for a purchaser of such property to have aide-mémoires drawing our attention to points which we ought to consider and possibly inquire about, than to have specific questions which we cannot even understand.

Our only criticisms of Part VI (apart from those made earlier in this article) relate to the unnecessary complication of some of the questions and to the fact that some of them could better be placed elsewhere. On the first point, is it necessary to ask question 17 (a) in its present verbose form? Would it not be simpler and shorter to say "Please give the addresses of the local authorities." However, the question is usually unnecessary: a helpful vendor's solicitor supplies the answer in his first letter; failing that, the purchaser's solicitor finds out for himself.

We now turn to questions which are not dealt with at all in the present form. There is one most important matter of planning which is barely covered by the present form and on which one gets no information from the standard inquiries of the local authorities. These inquiries deal only with the property being searched against. They do not deal with neighbouring property, however close. One of the standard questions is whether there is anything in the development plan affecting the property and a town clerk answering this is quite entitled, and indeed might feel himself bound, to restrict his answer to development zoned upon the site itself without reference to what might be zoned upon the plot next door. We have experienced a case, and our readers must have experienced hundreds like it, where the client bought a property, a new house, with a satisfactory answer to this question and only after having bought it, found that not merely one but two local authority schools were being built over his garden fence. There is no complete safeguard against a surprise of this kind and perhaps the best one can do is to add to the standard inquiries some such question as "Have you or the vendor heard of any proposed development in the neighbourhood or provision in the development plan which might affect the property?"

We have already referred to another matter which gives rise to difficulty in practice; namely that a purchaser inspects the property possibly some weeks before a contract is signed. When he does so,

he may see some fixture which is an attraction to him in buying the property but unless he asks about it he may not realise that the vendor intends to remove it. If it is as a matter of law a fixture, then the vendor is not entitled to do so and one can after completion have a delightful legal argument about it, but if the article is in law a mere fitting, *i.e.*, a chattel, the vendor is perfectly within his rights. The safe course, then, is to adopt the muddled expression beloved of estate agents and say, " Does the vendor propose to remove any fixtures or fittings from the property? " This should safeguard against the disappearance of the portable greenhouse which so attracted the keen gardening purchaser—or even of all the best rose bushes!

In the case more particularly of country property, but also in the case of newly developed property in a town which does not abut directly on a public highway, it is relevant to know what services it has and how they reach it (or in the case of sewage, get away from it). The purchaser himself will probably be aware, from inspection or from the estate agents' particulars, if water, for example, is drawn from a source on neighbouring land; and the appropriate detailed questions can be asked, but, if it is desired to ask a general question when information is lacking (and, we repeat, it is often wise to do so even in fully developed areas) it might take some such form as " Does the property drain directly to a public sewer and draw its water and other services from the pipes, wires, etc., of the statutory undertakings without traversing the land of any other person? " We have already suggested a general question dealing with third-party rights over the property but, if it is in the country, it may be as well to ask specifically: " Is there any public right of way over the property? "

Another point which can give rise to great difficulty and occurs most often in the case of country properties is rights over a private roadway between the property and the highway. A simple question is " If the property stands on a private road, can the vendor grant or convey (and show title to) a valid right of way from the property to the nearest public highway? " Again, this may need considerable elaboration in particular cases.

Another point of general application in the case of all properties and one which sometimes brings quite interesting facts to light is " Do you or the vendor know of any dispute, actual or potential, with the occupier of any nearby property? "

Lastly, it is often useful to ask what date the vendor has in mind for completion. Arranging that this takes place on a date convenient to both parties is, after all, one of the principal difficulties

of practical conveyancing, and the sooner one knows what is wanted the better.

We appreciate that it is easier to be destructive than constructive. However, we set out on p. 714 *post* our own suggested form of inquiries.

It will be seen that not all the questions mentioned above are included in our form. This is because we have not attempted to deal with matters, such as tenancies, which do not occur in most routine transactions. Further questions would have to be added where appropriate to deal with these.

We do however hope that our form confines itself to relevant facts only and is easily comprehensible.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Re Gilbert's Application [1961] 1 W.L.R. 822; [1961] 2 All E.R. 313 (Ch.D.)

Registered land—appeal from decision of Chief Land Registrar—procedure—trial de novo or rehearing—Land Registration Rules, 1925, *rr.* 298, 299; *R.S.C., Ord.* 54D, *rr.* 6, 11.—This was a procedure summons in the first appeal to the court, under the Land Registration Rules, 1925, r. 299, from a decision of the Chief Land Registrar, whereby he had ordered rectification of the register by removal of a note of a right of way. (The Registrar himself has, of course, referred matters to the court under L.R.R. 298 (2), *e.g., Re 139 Deptford High Street* [1951] Ch. 884.)

The present question, arising out of the appellant's desire to adduce evidence not before the Registrar, was whether there should be a trial *de novo* or by way of rehearing. R.S.C., Ord 54D, r. 6 provides that references and appeals from the Chief Land Registrar shall be instituted by originating summons and be heard by a single judge nominated for the purpose by the Lord Chancellor, while rule 11 requires the ordinary practice of the Chancery Division to be applied so far as not inconsistent with Ord. 54D.

Russell J., in a considered judgment, after reviewing the rules applicable to similar appeals, and referring to *Allender* v. *Royal College of Veterinary Surgeons Council* [1951] 2 All E.R. 859 and *Re Henderson's Conveyance* [1940] Ch. 835, held that on principle these appeals were by way of rehearing, but that in a proper case the court could admit further evidence. The learned judge went on to consider various points concerning the procedure which should be followed both at the hearing before the Chief Land Registrar and in bringing an appeal. His remarks in this connection naturally merit study by all concerned with a hearing or appeal. The immediate result was that certain evidence which the Master was minded to exclude went forward for eventual admission or exclusion by the court, so if the appellant's main argument failed at least he lived to fight another day.

The steady increase in the number of registered titles naturally increases mathematically the likelihood of hearings by the Chief Land Registrar and so of appeals. This system of resolving disputes must therefore increasingly become the concern of conveyancers, and it is useful to have this early guidance on procedure.

Gavaghan v. *Edwards* [1961] 2 W.L.R. 948; [1961] 2 All E.R. 477 (C.A.)

Sale of land—contract—uncertainty of date for completion—evidence in writing—authority of solicitor to sign memorandum—Law of Property Act, 1925, *s.* 40.—The plaintiff vendor and the defendant purchaser agreed on May 6, 1958, and signed on May 7, a "contract" for the sale of a house, subject to the Law Society's Conditions of Sale, 1953, as varied by any special terms. Clause 6 of the contract provided that "the date fixed for completion is to be agreed between the parties." Subsequently the vendor told his solicitors the purchaser wanted them to act for him; they wrote to the purchaser accordingly on May 9 but he did not reply. Shortly afterwards the plaintiff and defendant agreed on the date for completion (January 31, 1959) and on May 15 the solicitors wrote to the defendant that "[the vendor] informs us that the date for completion is January 31. . . . May we take it please that this is in order." A note was endorsed that on May 16 the purchaser telephoned and confirmed the date. Later the purchaser declined to complete and took the point that there was never a complete contract evidenced in writing as required by the Law of Property Act, 1925, s. 40.

The Court of Appeal (Ormerod, Willmer and Danckwerts L.JJ.) held—the only full judgment being delivered by Danckwerts L.J.—(1) authority for the solicitors to act for the purchaser could be inferred from the circumstances; (2) unless the solicitor had authority to sign a memorandum on behalf of the purchaser, there was not sufficient evidence in writing to satisfy section 40 of the Law of Property Act, 1925; (3) though the mere relationship of solicitor and client does not authorise the former to sign a memorandum, yet where a solicitor is acting for both sides, and the parties have in fact agreed, there is implied authority to record a term so as to make a contract binding; (4) the letter of May 15 signed by the solicitors constituted a memorandum signed on behalf of the purchaser by someone thereunto duly authorised, so section 40 was satisfied; and (5) it was therefore unnecessary to decide whether the express term as to agreement of the time for completion excluded the general condition of the Law Society's Conditions, whereby the date for completion is seven weeks after contract. (If there was no such exclusion there was of course an initial contract.)

This case, like so many others, raises the question of the usefulness of the requirement of evidence in writing even in contracts for the sale of land. But so soon after the Law Reform (Enforcement of Contracts) Act, 1954, which did not affect the Law of Property Act, 1925, s. 40, it would be idle to expect further reforms.

It may also be noted that Danckwerts L.J., who decided *Goody* v. *Baring* [1956] 1 W.L.R. 448; [1956] 2 All E.R. 11, said he regarded the situation of a solicitor acting for both sides as "very unsatisfactory," though conceding the arrangement might work well unless anything went wrong. With respect, solicitors may feel that matters go wrong so rarely that "very unsatisfactory" is rather a strong phrase.

Dunn v. *Blackdown Properties Ltd.* [1961] 2 W.L.R. 618; [1961] 2 All E.R. 62 (Ch.D.)

Easement—future right of drainage—application of rule against perpetuities—Law of Property Act, 1925, *s.* 162 (1) (*d*) (iv).—By two conveyances on sale, in 1926 and 1938, predecessors in title of the plaintiff acquired two plots of land in a road called Pine Tree Hill. Each conveyance conferred also on the grantees, *inter alia,* full right and liberty to use the sewers and drains "now passing or hereafter to pass" under certain parts, delineated on plans, of Pine Tree Hill and an adjacent road, Norfolk Farm Road. (In the statement of facts the reports use the past tense in stating the contents of the grants, but a phrase in the judgment shows the present tense was used, as of course one would expect.) The plots of land and the appurtenant easements were now vested in the plaintiff, and the soil of Pine Tree Hill in the defendants, successors in title to the original grantors. Until 1958 there were no sewers under Pine Tree Hill but two were then constructed, one reaching the main sewer via Norfolk Farm Road, and the other via land of the defendants. The plaintiff claimed a declaration that she was at any time entitled to join, to these sewers, drains from her plots of land.

Cross J. held, first, that in general the rule against perpetuities applies to the grant of easements, so that "where the grant is not immediate but of an easement to arise in the future, it will be void unless it is limited to take effect only within the perpetuity period" ([1961] 2 W.L.R. at p. 621; [1961] 2 All E.R. at p. 65). This is the view generally taken in the books, *e.g.,* Halsbury, 3rd ed., Vol. 29, p. 290, note (e); Morris and Leach, *The Rule against Perpetuities,* at pp. 221–223, where the authorities are collected. Secondly, the learned judge held that as a matter of construction the words of the conveyances purported to grant future and not present easements. Here he distinguished both *South Eastern Ry.* v. *Associated Portland Cement Manufacturers (1900), Ltd.* [1910] 1 Ch. 12; on appeal [1910] 1 Ch. 27, and *Sharpe* v. *Durrant* (1911) 55 S.J. 423; on appeal [1911] W.N. 158. In those cases grants were made of the right to construct or have constructed crossings over rail or tram lines at points to be selected by the grantees of the purported easements; in the former case Swinfen Eady J. held a present right passed, and in the latter Warrington J. held that there was a future right which was void for perpetuity; in neither case did the Court of Appeal pronounce on the point. Cross J. here held that as the grantee had no right to determine when or whether any drains would be constructed no present right could have been created. In other words the possibility of a "beneficent" attitude of the courts on construction (see Morris and Leach, *op. cit.,* at p. 222) was excluded. Thirdly, Cross J. held that the grants were not saved by the Law of Property Act, 1925, s. 162 (1) (*d*), whereby the rule against perpetuities is declared not to apply to grants, etc., of any easements for the purpose of ". . . (iv) constructing, laying down, altering, repairing, renewing, cleansing and maintaining sewers, watercourses, cesspools, gutters, drains. . . ." He construed the above paragraph (iv) as limited to auxiliary works necessary to the enjoyment of existing rights, and

as ineffective to validate rights otherwise void for perpetuity; moreover, even if the statute authorised the plaintiff to join up her drain it did not authorise any right to pass effluent through the defendants' sewer. Lastly, the learned judge held that, if he was wrong on the perpetuity point, the grants should be construed so as to include user of the sewer running under other land of the defendants.

It would seem that the "now or hereafter" formula may be frequently used in practice. For example, it appears in Key and Elphinstone's *Conveyancing Precedents,* 15th ed., Vol. 1, at pp. 590, 600 and 699, and in the *Encyclopaedia of Forms and Precedents,* 3rd ed., Vol. 6, at p. 441 *et seq.* in relation to rights of drainage, way, air and support. The position would seem to be the same whether the drain, way, etc., or the building to be benefited, remain to be constructed. The grant or reservation of rights of light and support for buildings not yet constructed may pose particular problems. It would seem desirable to include a "royal lives" perpetuity limit whenever a possible future easement is involved.

Stock v. *Wanstead and Woodford Corporation*
[1961] 2 W.L.R. 868; [1961] 2 All E.R. 433

A note and short article on this case appears *ante*, p. 267.

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2. *TRUSTS*

Hunter v. *Hunter and Waddington* [1961] 2 W.L.R. 691; [1961] 2 All E.R. 121 (P.D. & A.)

Divorce—settlement of wife's property—wife domiciled abroad with property here—jurisdiction—drafting and execution of document —Matrimonial Causes Act, 1950, *s.* 24; *Supreme Court of Judicature (Consolidation) Act,* 1925, *s.* 47. — This was an application by a husband petitioner under the Matrimonial Causes Act, 1950, s. 24, asking that the guilty wife be ordered to settle property for the benefit of the children of the marriage. The wife's property in England consisted of a share in the matrimonial home worth some £2,000 and a reversionary interest under her father's will, which would have been worth £14,000 had it fallen into possession at the date of the hearing. The wife, who had remarried and acquired a domicile in Kenya, demurred both to the jurisdiction and to the extent of the order proposed by the registrar.

Scarman J. in a reserved judgment held, first, that even if a respondent is neither domiciled nor resident in England, the court may nevertheless order a settlement of property which is within the jurisdiction—the requirement is that any order made may be effectual. This he held to be the principle of *Tallack* v. *Tallack and Broekma* [1927] P. 211, though this case had been relied on by counsel for the wife as denying jurisdiction. A second point taken for the wife was more troublesome. It was argued that the court had no power to

order a settlement to be drawn up, on the authority of *Style* v. *Style and Keiller* [1954] P. 215 where Barnard J. at first instance and Singleton L.J. in the Court of Appeal commented on the omission from section 24, and inclusion in sections 19 and 22, of the 1950 Act of a power to refer such matters to conveyancing counsel. Scarman J. pointed out that but for the express differences in the sections R.S.C., Ord. 51, r. 7 and the Matrimonial Causes Rules, 1957, r. 82 would have conferred the necessary power, and held, first, that *Style* v. *Style and Keiller, supra,* was not a binding authority since the remarks were *obiter,* and second that the words of section 24 were sufficient to empower the court to order a settlement to be drafted. In the actual case, the decision seemed likely to result in the court's approval of a draft submitted by the husband. Thirdly, the learned judge held that the Supreme Court of Judicature (Consolidation) Act, 1925, s. 47 enabled the court to appoint someone to execute the settlement on behalf of the wife as a " conveyance, contract or other document." The learned judge then reviewed and amended the terms of the settlement provisionally ordered by the registrar.

This is, it is respectfully submitted, an eminently satisfactory and sensible decision on all points. In particular, once jurisdiction has been taken on the ground of the existence of property here, it would be most unfortunate if a flaw in the drafting of the statute left the court impotent to implement its order. As Lopes L.J. said in another context in *Colquhoun* v. *Brooks* (1881) 21 Q.B.D. 52 at p. 65: " The maxim *expressio unius exclusio alterius* . . . is often a valuable servant but a dangerous master to follow in construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident and the maxim ought not to be applied where its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."

Re Pilkington's Will Trusts [1961] 2 W.L.R. 776; [1961] 2 All E.R. 330 (C.A.)

Advancement—extent of statutory power—new settlement on an infant—Rule against Perpetuities—Trustee Act, 1925, *s.* 32.—The decision of Danckwerts J. in *Re Pilkington's Will Trusts* [1959] Ch. 699 (noted *ante,* Vol. 23, at p. 396 and discussed at greater length in an article by Mr. D. W. M. Waters, *ante,* Vol. 23, at p. 423) has been reversed by the Court of Appeal (Lord Evershed M.R., Upjohn and Pearson L.JJ.). The long interval is accounted for by the addition of the Crown as a party and the granting of leave to appeal out of time.

The facts may be briefly recalled. Under a settlement made in 1934 a trust fund was held for R.G.P. for life and thereafter among his children as he should appoint, with trusts in default of appointment. The trustees desired to exercise the statutory power of advancement, conferred by the Trustee Act, 1925, s. 32, by transferring almost all the presumptive share of Penelope, a daughter of R.G.P. born in 1956, to trustees of another settlement, formed or to be formed for the purpose, on trust to pay or apply income for Penelope's benefit

until she attained twenty-one, to pay her the income from the age of twenty-one to thirty and to hold the capital for her absolutely; if she died under twenty-one leaving children the property was to be held in trust for them at twenty-one. Danckwerts J. held this exercise of the statutory power valid, thereby providing settlors and trustees with a means of "outflanking" (to use Mr. Water's word) both the maxim *delegatus non potest delegare* and the Rule against Perpetuities.

The Court of Appeal, in judgments delivered by Lord Evershed M.R. and Upjohn L.J. (with Pearson L.J. concurring) accepted that the trustees genuinely considered the proposed transaction to be for Penelope's benefit. The advantages, of course, lay principally in the field of taxation and also, it was argued, in Penelope's acquisition both of immediate rights irrespective of her father's power of appointment, and of some protection against the possibility of her own extravagance. The Master of the Rolls had some doubts about the latter argument but Upjohn L.J. was content to assume the trustee's view was reasonable. In this connection Lord Evershed was prepared to construe benefit widely and not *ejusdem generis* with "advancement" in the sense of establishing a beneficiary in life, and rejected the suggestion that advancement meant only acceleration and not postponement of interest (citing *Lowther* v. *Bentick* (1874) L.R. 19 Eq. 166 and *Re Halstead's Will Trusts* [1937] 2 All E.R. 570); Upjohn L.J., however, though referring to the same cases, was inclined to take a more restricted and traditional approach. Both judgments accepted, further, that advancement might involve the creation of settlements containing clauses in favour of non-objects of the power (*e.g.*, a wife or issue) provided always the original and proper object was thereby benefited (*Roper-Curzon* v. *Roper-Curzon* (1871) L.R. 11 Eq. 452 and *Re Halstead, supra.*

Nevertheless, despite these qualifications, the court held that the proposed arrangement did not fall within the ambit of section 32. "The advantages . . . enumerated are, to my mind, of an impersonal kind when related to Penelope, whereas, according to my understanding of the section, the advancement or benefit intended should be personal to the person concerned in the sense of being related to his or her own real or personal needs; . . . the exercise of the power, if truly within the section, must be an exercise done to meet the circumstances as they present themselves in regard to a person within the scope of the section whose circumstances call for that to be done which the trustees think fit to do. Unless this be so, I see no limitation to the scope of the power" (*per* Lord Evershed M.R. [1961] 2 W.L.R. 766 at pp. 785, 788; [1961] 2 All E.R. 330 at pp. 336, 337). "Like my Lord, I do not think it possible to lay down any rule as to the ambit of the powers conferred by section 32 except to say that the exercise of the power must have reference to the actual circumstances of the object of the favour requiring to be benefited at the time of the exercise of the power" (*per* Upjohn L.J. [1961] 2 W.L.R. 776 at p. 790; [1961] 2 All E.R. 330 at p. 339).

The heart of the matter is therefore, it seems, the requirement of present need. As to this, the roles of the court and the trustees seem not unlike those of judge and jury in a trial at common law; the court must be satisfied that there is evidence of circumstances from

which the trustees can reasonably deduce a present need, and if these exist the trustees have to decide whether or not to make the advancement. In the present case the trustees were acting *ultra vires* the powers of section 32 and seeking to remodel the trust (*per* Lord Evershed M.R. [1961] 2 W.L.R. 776 at pp. 783, 788; [1961] 2 All E.R. 330 at pp. 334, 338). Here it may be noted that the unsuccessful arguments as to benefit have often succeeded in applications under the Variation of Trusts Act, 1958; the distinction is, of course, that between trustees carrying out the terms of a trust, and the court deliberately varying the terms of a trust, so different considerations are relevant.

The second point in the case concerned the Rule against Perpetuities. Here Lord Evershed M.R. (and Pearson L.J.) preferred to express no view, though pointing out the difference between the present case and a decision to transfer funds to an entirely separate pre-existing trust. Upjohn L.J. however, held that the power of advancement was to be equated with a special power so that time ran from the original settlement (*Re Fane* [1913] 1 Ch. 404) unless the property was at some moment held by a person *sui juris*. In the latter event, of course, the position is comparable to the traditional barring of an entail followed by an immediate resettlement.

Re Howard's Will Trusts [1961] 2 W.L.R. 821; [1961] 2 All E.R. 413 (Ch.D.)

Condition subsequent—name and arms clause—certainty—public policy.—The court was here asked to determine the validity of a "name and arms" clause, contained in a will which took effect in 1934, whereby any person becoming entitled to certain settled estates, and the husband of any woman so becoming entitled, was required to assume within one year of the death of a named life tenant the name and arms of Howard and to use and bear the same on all occasions, with a proviso that on any discontinuance the estate of the person concerned should immediately determine.

Wilberforce J. in a considered judgment gave a valuable review of the history of such clauses since *Re Fry* [1945] 2 All E.R. 205 initiated the development against them of "a wind of change of increasing force" (is this, incidentally, the metaphor's first appearance in the law reports?).

On the question of certainty, the learned judge applied the accepted test that a condition subsequent must enable the court and the parties to see precisely and distinctly from the beginning what must be avoided or done to bring about forfeiture, but added that the clause should be examined without hostility or excessive ingenuity, seeking only real and not fanciful objections (*Re Neeld* [1960] Ch. 455; *Bromley* v. *Tryon* [1952] A.C. 265). On this basis Wilberforce J. found the vital word "discontinue" to be in its context clear and certain and to involve forfeiture by failure to use on one occasion; likewise the words "on all occasions" clearly referred to all occasions on which a surname is used—"surname occasions"

and not " Christian name occasions " or " nickname occasions " or " pseudonym occasions " ([1961] 2 W.L.R. 821 at p. 829; [1961] 2 All E.R. 413 at pp. 418–419) following *Re Neeld, supra,* and *Re Drax* (1906) 75 L.J.Ch. 317. These two decisions, however, limited the operation of such a clause to occasions on which a surname is normally used; the exclusion of " pseudonym occasions " appears to go further and, with respect, to introduce itself an element of uncertainty. For example, what of the film actress who seeks alliterative euphony, or the woman barrister or doctor who continues to practise under her maiden name?

On the issue of public policy Wilberforce J. said that in his personal view this particular type of condition subsequent was no more objectionable than any other, even if applied to married women and their husbands. Indeed, he termed the liberty to make eccentric testamentary dispositions an important objective of public policy, to which he found no contrary objective of equal or comparable weight. Nevertheless he concluded that in the interests of the principle of *stare decisis* he should follow *Re Kersey* [1952] W.N. 541 and hold the present clause invalid as regards a married woman, but valid as regards a man, a spinster or a widow—the relevant date being that on which the beneficiaries were required to act.

Lastly, on a subsidiary point of construction, Wilberforce J. held that a release of a life interest did not accelerate the operation of the name and arms clause—the words " under the limitations hereinbefore contained " made the death of the life tenant the relevant moment (following *Re Petre's Settlement Trusts* [1910] 1 Ch. 290).

The name and arms clause therefore continues its journey back to judicial favour. But the need for a full and authoritative pronouncement on the law by the Court of Appeal is again emphasised.

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3. *CHARITIES*

By J. T. Farrand, ll.b., Solicitor

Abdul Gaffoor Trustees v. *Commissioners of Income Tax, Colombo* [1961] 2 W.L.R. 794; [1961] 2 All E.R. 436 (J.C.P.C.)

Education—whether of public nature—class of beneficiaries—exemption from income tax—res judicata—Ceylon Income Tax Ordinance.—The Judicial Committee of the Privy Council (Lord Morton of Henryton, Lord Radcliffe, Lord Morris of Borth-y-Gest, and the Rt. Hon. L. M. D. de Silva) was here concerned with assessments to income tax for the revenue years 1950–51 to 1954–55 made on the income of a trust established by deed. The appellant-trustees claimed that the income was exempt from liability to tax by virtue of section 7 (1) (*c*) of the Ceylon Income Tax Ordinance applying to trusts " of a public character established solely for charitable purposes." In view of the fact that " charitable purposes " were defined by section 2 of the Ordinance to include " relief of the poor, education, and medical relief," and that the definition of a " charitable trust " in section 99 (1) of the Ceylon Trusts Ordinance included any trust

" for the benefit of the public or any section of the public " falling within any one of a number of categories which extended to such purposes as the relief of poverty and the advancement of education or knowledge, the Committee (whose advice was delivered by Lord Radcliffe) was able to invoke the general principles that govern the English law as to the validity of charitable trusts. Most interestingly, however, the Committee saw no necessity, in the present case, to include in those general principles any of the special anomalies attributable to English local conditions or history. In particular neither the " founder's kin " nor the " poor relations " cases were thought applicable to the law of Ceylon, despite the patent influence of English law (see *per* Lord Macnaghten in *Pemsel's Case* [1891] A.C. 531, 583) on the Sinhalese conception of a charitable trust.

In essence, for present purposes, the trust in question was for the education of such deserving youths of the Islamic faith as the trustees might in their discretion decide, but with a provision that the beneficiaries " shall be selected by [the trustees] from the following classes of persons and in the following order: (i) male descendants along either the male or female line of the grantor or any of his brothers or sisters failing whom (ii) . . ." Thus the question clearly was whether or not this trust could be said to be " of a public character." Although the Committee agreed that a public character would not be destroyed merely because the founder's kin are explicitly mentioned or even, possibly, given some preference amongst the beneficiaries, they were nonetheless of the opinion that the absolute priority conferred here created a family trust not having the requisite public character, and so not within the tax exemption. The Committee recognised that their advice might well be inconsistent with the decisions in both *Re Koettgen* [1954] Ch. 252 and *Oppenheim's Case* [1951] A.C. 297, but were content to leave this as due to a differing construction of particular wordings. However, the main interest for English lawyers lies in the apparent lack of enthusiasm on the part of the Committee for the anomalies represented by these two decisions, a lack of enthusiasm which is in the same spirit as the recent reaffirmation of the necessity for a public nature by the House of Lords in *I. R. C.* v. *Baddeley* [1955] A.C. 572. Thus, for example, that genus of trusts for the relief of poverty from which public benefit is omitted, although long established as charitable, might appear less well established on review (which is still open) by the House of Lords.

A preliminary point was also decided by the Committee against the appellant-trustees. In 1954 a board of review constituted under the Tax Ordinance had heard the trustees' appeal against assessment to tax of the trust income for the preceding revenue year, 1949–50, and, since the Board had then held the exemption mentioned above to be applicable, the trustees now contended that this decision constituted an estoppel *per rem judicatem* on the question of exemption. The Committee, however, rejected this contention on the ground that the dispute determined by the board's decision was limited to the amount of assessable income for the year in which the assessment was challenged (*i.e.*, the revenue year 1949–50) and that the consideration of questions of law or construction (*i.e.*, the applicability

of the exemption) in order to arrive at the decision was merely collateral thereto. The Committee applied, with some measure of approval, *Society of Medical Officers of Health* v. *Hope* [1960] A.C. 551.

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4. *WILLS*

By J. T. Farrand, LL.B., Solicitor

In the Estate of Bercovitz, decd. [1961] 1 W.L.R. 892; [1961] 2 All E.R. 481

Execution—testator's signature at both head and foot of will—one at head only attested—maxim omnia praesumuntur rite esse acta considered—Wills Act, 1837, *s.* 9.—No novel point of law was resolved in this case which merely affords one more illustration of the ingenuity so often used by testators to enable section 9 of the Wills Act, 1837, to fulfil its primary function of frustrating their intentions. The present testator typed his will on a single sheet of paper, heading it on the left-hand side with an attestation clause in the normal form. To the right of this clause appeared the testator's signature and beneath it the signatures of two attesting witnesses. The testator's signature but not those of the two attesting witnesses appeared also at the foot of the sheet.

Phillimore J. first reaffirmed that the witnesses must attest the operative signature of the testator, namely the one at the foot or end of the will, and that whether they have done this depends not on the position of their signatures (*In the Goods of Chamney* (1849) 1 Robb.Eccl. 757) but on their intention so to do, for which they must have seen or had the opportunity of seeing the operative signature either made or acknowledged (following *Phipps and Biddell* v. *Hale* (1874) L.R. 3 P. & D. 166). Here one of the attesting witnesses said in evidence that she had been, in effect, aware only of the signature of the testator at the head of the will, and from a review of the facts (which are more fully stated in the *All England Law Reports* than in the *Weekly Law Reports*) the learned judge inferred that the witnesses only intended to attest this non-operative signature. Phillimore J. then considered the maxim *omnia praesumuntur rite esse acta* after pointing out that the court was not confined to the evidence of attesting witnesses whose memories are often fallible. He concluded regretfully that, as the maxim was weakened by the irregularity in form of the present will and in view of the inference he had taken as to the attesting witnesses' intentions, to apply the maxim would be to fly in the face of the probabilities. The maxim is, of course, only a presumption (lent spurious authority by not being in English) used like any other to tip the scales when the lack of sufficient facts has left the probabilities evenly balanced, and here there were sufficient facts not to permit the valid execution of the will in question to be presumed.

Lastly, it may be asked, has section 9 of the Wills Act, 1837, any supporters? Should it not go the same way as section 4 of the Statute

of Frauds, 1677? At least the deletion of the one restricting condition of the verbose section 1 of the Wills Act Amendment Act, 1852, is indicated to set free the spirit of that Act (see *per* Sir James Hannen in *In the Goods of Wotton* (1874) L.R. 3 P. & M. 159, 161) and render operative a signature wherever placed provided only that it is apparent that "the testator intended to give effect by such his signature to the writing signed as his will."

Re Berry, decd. [1961] 2 W.L.R. 329; [1961] 1 All E.R. 529

Rule in Howe v. *Earl of Dartmouth—testator's business sold after death as a going concern—profit and loss in the meantime—whether rule excluded by terms of will.*—In this case Pennycuick J. was concerned not with the primary rule in *Howe* v. *Earl of Dartmouth* (1802) 7 Ves. 137, under which a duty to convert arises but with the logical corollary thereto which gives rise to apportionment between capital and income pending performance of this duty. Such apportionment is the logical corollary also to a duty to convert arising by express provision or even by statute, and is then still, somewhat improperly, known as the rule in *Howe* v. *Earl of Dartmouth* although often called "the 4 per cent. rule." As an equitable rule it may, of course, be excluded by an express or implied contrary intention.

In the present case, in essence, residue including the testator's hotel business was given by will to trustees on trust to sell, with power to postpone sale, to invest the proceeds, to pay the income thereof to the testator's widow for life and thereafter to hold both capital and income for his two daughters in equal shares. The widow and the two daughters all survived the testator. Clause 7 of the will provided that ". . . no part of any dividends rents interest or moneys of the nature of income shall be apportioned to or treated as capital of my estate and I declare that the whole thereof (whether the same be paid in respect of a period wholly or only partly prior to my death) shall belong to the person entitled under my will to the investment or property from which the same respectively arose and if there shall be a tenant for life of such investment or property such dividend rent interest or money shall be income payable to such tenant for life." Clause 9 provided that "any moneys requiring investment under the provisions of this my will may be invested in any investments which my trustees shall in their absolute discretion think fit whether trustee securities or not." Although there was no express power for the trustees to carry on the testator's business except for the purposes of winding up, it was in fact sold by them as a going concern within a year of the testator's death having in the meantime made a seasonal profit and a seasonal loss. The question, therefore, was whether the tenant for life should bear this profit and loss or whether there should be an apportionment between capital and income under the secondary rule in *Howe* v. *Earl of Dartmouth*.

Pennycuick J. first followed what he called "an overwhelming balance of authority" (applying, *e.g.*, *Re Chaytor* [1905] 1 Ch. 233 and rejecting *Re Fisher* [1943] Ch. 377) and held that the rule was not excluded by the fact of the will containing a trust for conversion

with a power to postpone. This, which is no surprise, may be contrasted with the position where there is a trust for conversion with an independent power to retain investments (see *Re Inman* [1915] 1 Ch. 187). Secondly, the learned judge held that, despite the wide wording of clause 9 of the will, the testator's business was not an authorised investment (to which the rule would clearly not have applied) since it is well established that there must be an express provision to empower trustees to carry on a testator's business. Thirdly, he held that there was nothing in clause 7 (which would appear to be aimed at the Apportionment Act, 1870) or in the other terms of the will apt to exclude the rule.

Although this last was clearly a question of construing a particular will and is not of general application it does demonstrate that clear words must be used if it is wished to exclude the rule in *Howe* v. *Earl of Dartmouth*. And if the point is brought to their attention (particularly in the light of the present limited range of authorised investments), as it should be, most testators do wish to exclude the rule, thus rendering extremely artificial its basic supposition of intention. The main reason for exclusion is to simplify the administration of the estate since otherwise difficult accountancy problems are created and it is for the same reason desirable to exclude the rule in all its branches (*i.e.*, also the complex rule in *Re Chesterfield* (1883) 24 Ch.D. 643 as to reversionary interests).

The result in the present case was that the widow, as tenant for life, was entitled to income at the rate of 4 per cent. per annum, no more and no less, of the proceeds of sale of the business from the death of the testator until the sale.

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5. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Clarke v. *Hall* [1961] 2 W.L.R. 836; [1961] 2 All E.R. 365 (Q.B.D.)

Agricultural Holdings Act, 1948—*notice to quit—assignment of tenancy—licence to assign containing new covenant—death of original tenant—"tenant with whom the contract of tenancy was made"—meaning of "tenant."*—This case raised a new point of construction on section 24 (2) (*g*) of the Agricultural Holdings Act, 1948, which provides that an agricultural tenant upon whom a notice to quit has been served is precluded from serving a counter-notice under section 24 (1) of the Act where "the tenant with whom the contract of tenancy was made had died within three months before the date of the giving of the notice to quit and it is stated in the notice that it is given by reason of the matter aforesaid." Widgery J. rejected a contention of counsel for the tenant that section 24 (2) (*g*) only applies where the tenant with whom the contract of tenancy was made is still tenant at the date of his death and held that "tenant" in section 24 (2) (*g*) means the individual who was the tenant when the contract of tenancy was made, whether he or she still holds the land at the date of his or her death or not.

The contract of tenancy in this case, which was for a yearly tenancy of agricultural land, but which contained no covenant against assignment or underletting, was originally made with the defendant's mother in 1948. In 1950 this tenancy was assigned to the defendant: and at the same time the landlord executed a document under seal consenting to the assignment (in the mistaken belief that this was necessary) and containing a covenant by the defendant not to assign or underlet the premises or any part thereof. In February 1959 the defendant's mother died: and in March 1959 the landlord served a notice to quit, which complied strictly with section 24 (2) (*g*). Counsel for the tenant, having failed in a contention that the landlord's "licence to assign" amounted to a novation, so that a new contract of tenancy was made with the defendant in 1950, argued that in view of the definition of "tenant" in section 94 (1) of the Act as "the holder of land under a contract of tenancy," the expression "tenant with whom the contract of tenancy was made" in section 24 (2) (*g*) should be read as "the holder of the land being the holder with whom the contract of tenancy was made"; and that section 24 (2) (*g*) only applies where a holder of land, who was also the original tenant, has died (whilst still holding the land) within three months before the notice to quit. Widgery J. took the view, however, that it was "implicit in that argument that a reference to 'tenant' in section 24 should not, unless the context otherwise requires, include a former tenant." But both section 24 and section 94 make it clear that the expression "tenant" is used by the draftsman to include a former holder as well as the present holder of the land. He held, therefore, that the person referred to as tenant in section 24 (2) (*g*) is "someone who is not now the tenant because he or she is dead, but someone who was the tenant on a former occasion."

The landlord's notice to quit was therefore held to be valid and effective despite the "counter-notice" which had been served by the tenant under section 24 (1) within twenty-eight days of the notice: and the questions whether (1) the tenant was estopped by his conduct from disputing the validity of the notice to quit and (2) the tenancy had been surrendered by operation of law, upon both of which Widgery J. would, on the facts, have found in favour of the tenant, did not arise.

Ayling v. *Wade* [1961] 2 W.L.R. 873; [1961] 2 All E.R. 399 (C.A.)

Covenant—sub-lease—covenant by sub-landlord . . . to observe the covenants contained in the head lease and to keep the tenant indemnified against them—repairing covenant in head lease—effect.—An assignee of a lease sub-let part of the demised premises and covenanted as sub-landlord "to pay the rent reserved by and to observe the covenants contained in the lease under which the landlord holds the demised premises and to keep the tenant indemnified against the same." The head lease contained a repairing covenant by the original tenants; and as a result of faulty repairs to a skylight, damage was caused to property of the sub-tenant by the entry of rainwater. The Court of Appeal held that the sub-landlord was liable in damages. The

covenant was not merely an indemnity covenant, which would impose no liability on the sub-landlord unless and until steps had been taken against him as head tenant to forfeit the head lease. It is true that in the case of assignments of a lease covenants of this nature have been construed merely as covenants by the assignee to indemnify the assignor against the results of the assignee's defaults. But in the case of an assignment the assignor is only interested after the assignment in the possibility of being sued by the landlord, since he no longer retains any estate or interest in the land: whereas in the case of a sub-lease the sub-landlord does retain an interest in the property as head tenant, and he remains interested not only as head tenant in the terms of the head lease but also as sub-landlord in the condition of the premises which he has sub-let.

Further, even though a landlord cannot be made liable for repairs without plain words, the covenant in the present case plainly imposed upon the sub-landlord a very positive obligation to observe the repairing covenants in the head lease.

Lloyds Bank, Ltd. v. *Lake* [1961] 1 W.L.R. 884; [1961] 2 All E.R. 30 (Q.B.D.)

Repairs—sub-lease—covenant to repair by sub-tenant—damages for breach of covenant—settlement of claim by head landlord—claim against sub-tenant in respect of damage for which head landlord responsible—infestation by woodworm—sub-lease without notice of head lease—notional reversion on sub-lease—assessment of damages—whether costs of settlement with head landlord or of claim against sub-tenant to be included.—A variety of points arose in this case in connection with the assessment of damages for breach of a covenant by a sub-tenant to repair a seventeenth-century cottage. The facts were complex and to some extent unusual.

The head lease, which was originally granted for a term of twenty-one years from 1921 was extended in 1935 for a further term of twenty-one years from 1942, if the head tenant should so long live. The head lease contained covenants by the head tenant to repair the interior of the cottage and by the head landlord to repair the roof and the outside walls. In 1946 the head tenant granted a sub-lease of the premises to sub-tenants for a term of fourteen years subject to a condition that the term should forthwith determine on the death of the head tenant. The sub-lease contained covenants by the sub-tenants to repair not merely the interior but the whole premises. In 1957 the head tenant died; and both head lease and sub-lease were terminated by notice on the same day, December 25, 1957. A claim for dilapidations by the executors of the head landlord was settled by the executors of the head tenant (the plaintiffs) for £715. The plaintiffs then served a schedule of dilapidations on the defendant (the surviving sub-tenant) amounting to some £1,397: but they limited their claim to £715, the amount which they had agreed to pay to the executors of the head landlord.

Upon these facts His Honour Sir Brett Cloutman, v.c., q.c., held

first that the plaintiffs could not make any claim in respect of the roof and the outside walls, since the head landlords were responsible for these items under the terms of the head lease: but that they could claim in respect of damage caused to the premises by woodworm. Although a reasonably minded tenant of the class likely to take an old cottage of this character might expect some woodworm (see *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 92), in a case where, as here, the infestation is so bad that the floorboards have to be burned and replaced, damages are recoverable in respect of it, since a tenant would not want to risk damage to his furniture in these circumstances.

He held also that substantial damages were recoverable by the plaintiffs, even though, upon the facts of the case, their reversion was only momentary and notional. The fact that a reversion is only momentary and notional need not, in his view, prevent it from being valued. Even though the value of a property in repair is nil, the value of that same property out of repair " is minus £X, which is what the tenant must pay someone to take over, first the fag-end of the lease, and later the last moment of the lease." He agreed, however, that since it had not been proved that the defendant had any notice of the head lease, the amount paid by the plaintiffs to the freeholders could not be taken into account. He held, therefore, that the damages due under the sub-lease had to be assessed independently: but that even so, the sum claimed, £715, amounted to a fair estimate of the loss suffered.

Questions then arose with regard to (1) solicitors' and surveyors' fees incurred by the plaintiffs in respect of the claim under the head lease and (2) solicitors' and surveyors' fees in respect of the preparation of the schedule of dilapidations and claim under the sub-lease. Upon these questions it was held that in the absence of notice of the head lease the loss suffered by the plaintiffs under the former head could not be said to flow naturally from the defendant's breach of covenant: and, (applying *Maud* v. *Sandars* [1943] W.N. 246), that no damages could be recovered by the plaintiffs in respect of the cost of the preparation of their own schedule of dilapidations.

Chatham Empire Theatre (1955), *Ltd.* v. *Ultrans, Ltd.*
[1961] 1 W.L.R. 817; [1961] 2 All E.R. 381 (Q.B.D.)

Forfeiture—relief against forfeiture—sub-tenant—breach of covenant to pay rent in head lease—sub-lease of part of premises—claim by sub-tenant of part for relief against forfeiture—terms upon which relief should be granted.—The plaintiffs in this case granted a lease of land and buildings including a theatre, a cinema, a restaurant and a car park to Ultrans, Ltd., at a rent of £3,640 per annum. Ultrans, Ltd., sub-let the cinema only to Entertainments (Chatham), Ltd., at a rent of £780 per annum and took a premium from them of £1,000. The rent payable under the head lease fell into arrears for three quarters and the plaintiffs claimed forfeiture of the head lease of the whole of the premises. Entertainments (Chatham), Ltd., counterclaimed for relief against forfeiture in respect of the cinema.

Salmon J. accepted the principle that in a case of relief against forfeiture the landlords are entitled to be put back into the position they would have been in if the forfeiture had not occurred. But he rejected the contention of counsel for the landlord that the sub-tenants in this case could only be granted relief against forfeiture if they paid the whole of the arrears of rent due in respect of the whole of the premises. Section 146 (4) of the Law of Property Act, 1925, gives the court a very wide discretion as to the terms upon which relief against forfeiture should be granted to a sub-tenant: and in exercising that discretion the courts must take into account all the facts of each particular case. Upon the facts of the present case he held that the sub-tenants were entitled to relief upon payment of three quarters' rent in respect of the cinema only, together with an element for the premium of £1,000 without which the rent would have been higher. *London Bridge Buildings Co.* v. *Thomson* (1903) 89 L.T. 50, upon which the landlords relied, is a decision upon its own facts and is not authority for the proposition that a sub-tenant of part of the demised premises must in all cases pay the whole of the arrears of rent due under the head lease as a condition of obtaining relief against forfeiture. Nor will such a sub-tenant necessarily obtain relief upon payment of a proportionate part of the arrears. Each case depends upon its own facts.

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6. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*: Where a case is not reported in any of the general series of law reports it is cited from *Taxation Reports* (T.R.).)

Dunn v. *I. R. C.* [1961] 2 W.L.R. 769; [1961] 2 All E.R. 257; [1961] T.R. 93 (Ch.D.)

Estate Duty—Settlement—Advancement—Aggregation

Statutory Provisions: Finance Act, 1940, s. 43 (1); Finance Act, 1954, s. 33 (1).

Point: Where property passing on the deceased's death includes settled property, which was not settled by the deceased and of which he was not competent to dispose, the other property passing on his death is not aggregated with the settled property for the purpose of determining the rate of duty payable on the whole if such other property is of a net value not exceeding £10,000. If the limit of £10,000 is exceeded, then the rate for the settled property is determined by aggregating both properties and such can, of course, considerably increase the rate payable. Where property has been advanced out of a settlement but still remains liable to duty on the death of the life tenant within five years of the advance, pursuant to section 43 (1), Finance Act, 1940, the advanced property must be treated as no longer settled property and thus as being part of the "other property" passing on the death.

Facts and decision: The fund settled by will was held upon trust for the testator's son during his life and after his death on trust for his issue. Shortly before the death of the son, the trustees advanced sums totalling some £2,600 for the benefit of the son's children. On the death of the son, the settled property was of a value in excess of £100,000 but his free estate was only slightly in excess of £6,000. The Revenue contended that the sums advanced, which were admittedly still subject to duty, were part of the settled property and thus aggregable with the settled property for the purpose of determining the rate of duty thereon.

Held: That the sums advanced were not still settled property. The effect of section 43, Finance Act, 1940, is not to require that the settlement should be treated as if the advancement had not been made but merely to include the advanced sums in the property passing on the relevant death. The effect of making an advancement is to take the property out of the settlement and there is nothing in the legislation which enables the Revenue to treat that which is *de facto* not settled property as settled property for the purpose of the Finance Act, 1954, s. 33.

The result of this decision is to place a further burden on trustees who have powers of advancement. In the present case, it was to the taxpayer's advantage that the advanced sums were aggregated only with the small free estate, rather than with the large settled estate for the purpose of ascertaining the rate of duty. If, however, the life tenant's free estate had been just under £10,000 and thus not aggregable the effect of the advancement might have been to cause the complete aggregation of the settled and free estate for the purpose of ascertaining the rate on each. It would thus be advisable in future for trustees making an advance to inquire as to the potential estate of the life tenant prior to so doing.

Montague L. Meyer, Ltd. and Canusa, Ltd. v. *Naylor*
[1961] T.R. 39 (Ch.D.)

Income Tax—Subvention Payments—Agreement

Statutory provision: Finance Act, 1953, s. 20.

Point: Where a company has a deficit for tax purposes during any accounting period of the company and receives a subvention payment in respect of that period from an associated company having a surplus for tax purposes in the corresponding period, the payment is treated as a trading receipt and a trading expense in the companies respectively. By the Finance Act, 1953, s. 20 (2) such result is only allowed to take place if the payment is made "under an agreement providing for the paying company to bear or share in the losses or a particular loss of the payee company." The mere fact of payment itself is not sufficient to show that there was an agreement and unless, therefore, an agreement is entered into between duly authorised agents of the two companies, the payment cannot be a subvention payment and operate to change the liability for tax on the income.

Facts and decision: The appellant companies, incorporated in England, had two French subsidiaries, whose day-to-day business was

carried on by a *gérant*. An agreement was made between the secretary of one of the English companies and a person to whom the *gérant* had purported to delegate some of his duties with regard to the French companies. The agreement was to the effect that the English company would make a subvention payment to one of the French companies in respect of a loss sustained by the latter. It was contended by the company that the payment made pursuant to the agreement was a subvention payment and thus a trading expense of the English company's operation.

Held: That the payment was not a subvention payment as there was no agreement. A corporate body can only act by some duly authorised agent and the person to whom the *gérant* delegated his duties was not such a duly authorised agent.

It was argued by the Revenue that the agreement between the companies had to be a legally binding agreement, giving rise to enforceable rights. The taxpayer contended that the word "agreement" was of wide import and might also cover an agreement in the sense that the two parties had arrived at a state of consensus of mind about the subject-matter, although there was no legal right or obligation. Buckley J. found it unnecessary to determine this question, as to which there is as yet no authority, for he held as above that there was no agreement in either sense of the word.

Prince v. *Phillips* [1961] T.R. 45 (Ch.D.)

Income Tax—Child allowance—Child's income

Statutory provisions: Income Tax Act, 1952, s. 212; Finance Act, 1957, s. 12 (3).

Point: The child allowance is claimable unless the child "is entitled in his own right to an income exceeding £100 a year." The question whether a child is entitled in his own right to an income of £100 is a matter which must be determined looking at the year of assessment as a whole and it is not necessary for the Revenue to show that in each and every part of the year the child was entitled to such an income. Further, in estimating the child's income during the year the normal provisions for assessing income for tax purposes are applicable.

Facts and decision: The appellant's two infant sons were in receipt of full-time instruction and wholly dependent on the appellant until July and October 1957 respectively. The first worked after August 1957 and his earnings in the year 1957–58 were £150. The younger worked from October 1957 and his earnings in that year were £112. It was contended by the appellant that for the earlier part of the year 1957–58 his sons were not in receipt of an income exceeding £100 per annum and that in the case of the younger son, as he had had to spend some £10 in travelling and in eating a midday meal, in addition to £6 national insurance contributions, his earnings over the whole year were under £100.

Held: That the appellant was not entitled to the child allowance, as each son was entitled in his own right to an income exceeding £100

in 1957–58. Looking at the whole year, each son had been entitled to something in excess of £100. In the case of the younger son, whilst the national insurance contributions were a legitimate deduction, the additional expenditure on travelling and eating was not a proper deduction from his income for tax purposes. The normal rules for non-deduction of such expenses as shown in *Ricketts* v. *Colquhoun* [1926] A.C. 1 and *Sanderson* v. *Durbidge* (1955) 36 T.C. 239 are applicable.

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7. *PLANNING CASES*

By V. G. Wellings, M.A.(oxon), Barrister-at-Law

Re Sneyd, decd. Robertson-Macdonald v. *Sneyd*
[1961] 1 W.L.R. 575; [1961] 1 All E.R. 744 (Ch.D.)

Compensation—settled land—payments made after death of life tenant—whether interest apportionable.—Under section 65 (3) of the Town and Country Planning Act, 1947: "Interest on the amount of any payment falling to be made in accordance with a scheme made under this Part of this Act shall accrue, at such rate as may from time to time be determined by the Treasury, from the appointed day until the payment is satisfied in accordance with the provisions of this section, and shall be paid in cash by the Central Land Board at the time when the payment is so satisfied." The tenant for life of settled land died in 1950. During his life there had been sales of some of the land. Under section 1 of the Town and Country Planning Act, 1954, the sales gave rise to payments of compensation comprising principal and interest. The question for determination was whether the interest was apportionable over the period from July 1, 1948, to June 30, 1955 (the relevant dates for the calculation of interest under section 14 of the Act of 1954), so that due proportions of it were payable to the life tenant's personal representatives as interest accrued from day to day, or whether the whole of the interest was to be treated as income accrued after the life tenant's death.

Pennycuick J. held that the word "accrued" in section 65 (3) of the Act of 1947 did not bear its strict meaning but meant no more than "shall be payable"; no principal debt came into existence until the value provisions of the Act had been carried through and the sum became ready for payment and no interest accrued from day to day until the date of satisfaction of the principal compensation. The interest payable was therefore not a "periodical payment" within the meaning of section 2 of the Apportionment Act, 1870, and the interest paid was income accrued after the life tenant's death.

THE LIBRARY

Enforcement of Planning Control. Current Law Practice Guide. By HAROLD J. J. BROWN, LL.M., Solicitor. Sweet & Maxwell, Ltd. 1961. xix and 120 pp. (17s. 6d.)

This attractively produced "paper-back" by a well-known writer on the subject comes at an appropriate time, for the learned author has been able to digest the effect of the Caravan Sites and Control of Development Act, 1960, while the statute is still new and has not yet been examined in the superior courts. A practical "guide" is therefore most welcome.

Although the Act of 1960 has reduced in number the various procedures whereby the validity of an enforcement notice may be questioned in the courts, this does not mean all the problems have been solved. Indeed, as the learned author points out there are still many unresolved problems, particularly those arising out of the time "limitation" in class IV (2) of the Schedule to the General Development Order (see p. 18 *et seq.*)

As well as the procedure connected with enforcement notices themselves, the book deals in detail with appeals to the Minister under section 33 of the 1960 Act, and also the licensing of caravan sites under Part I, *ibid.* The precedents of enforcement notices, notices of appeal, etc., in the Appendix have been thoughtfully prepared and should prove most useful in practice. In spite of the rather strange corrective jurisdiction of the Minister given by section 33 (5) of the 1960 Act (not discussed in detail by Mr. Brown), enforcement notices remain penal and highly technical documents; the local authority draftsman or the private practitioner concerned to "attack" a notice will be well equipped for his task with this inexpensive guide beside him.

J. F. G.

The Charities Act, 1960—with Annotations. By SPENCER G. MAURICE, Barrister-at-Law. Sweet & Maxwell, Ltd. 1961. xxii and 132 pp. (25s.)

This new book is not exactly the plain man's guide to charity, but to the practitioner who has experience in this difficult terrain it will be invaluable. It consists of an introduction which gives a first-rate general picture of what the Act sets out to achieve, followed by an annotation of the Act section by section which spotlights new provisions, consolidating provisions, and provisions likely to cause difficulty. The Act is printed in full including—an important point—the schedules.

Mr. Maurice avoids an excess of moot points while raising some interesting ones and hinting at others. Can next-of-kin, for instance, institute proceedings other than by way of rectification of the register to challenge a legacy for a purpose identical with a purpose already enshrined? For "an institution" in section 5 (1) includes (section 46) "any trust or undertaking." And if (p. 97), following the removal from the Statute Book of the famous preamble to the Act of 1601, whether a particular purpose is charitable has to be judged by case law, the position of a particular purpose mentioned in the preamble but not the subject of subsequent judicial comment is distinctly odd; would a trust for cripples now be considered charitable as being for the benefit of the impotent?

But such points are rightly subsidiary to Mr. Maurice's admirably accomplished main objective—that of revealing a firm reliable path through legislation as complex as it is important.

J. D. D.